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Supreme Court, U.S.
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No. 02 1637

In the

Supreme Court of the United States

JERRY KATE BAZOR, Widow of BEN BAZOR,

Petitioner,

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit Court of Appeals has misapplied the 1984 amendments to 33 U.S.C. § 902(3) by holding that the *Status* requirement for coverage, as stated in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), was modified?

II. Whether the Fifth Circuit Court of Appeals has misinterpreted the recreational operation exception to coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(B), in applying the exclusion to the construction phase of a casino vessel and failing to address the statutory threshold requirement for coverage under a state workers' compensation act?

III. Whether the Fifth Circuit has incorrectly determined that the phrase "customarily used" in 33 U.S.C. § 903(a) modifies the specifically enumerated *situs* locations in addition to the phrase "other adjoining areas" despite this Court's statements in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)?

IV. Whether the Fifth Circuit's temporal dimension rule, requiring the putative situs to have been used for loading and unloading at the time of a claimant's injury, produces a harsh, incongruous result in cases of cumulative injury that conflicts with the legislature's purpose as well as the Supreme Court's "zone of danger" doctrine?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners:

Jerry Kate Bazor, widow of Ben Bazor, and individual

Director, Office of Workers' Compensation Programs, United States Department of Labor

Great-West Life and Annuity Insurance Company

Respondents:

Boomtown Belle Casino

Louisiana Workers' Compensation Corporation

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IN THE
SUPREME COURT OF THE UNITED STATES

JERRY KATE BAZOR,
widow of BEN BAZOR,
Petitioners,

VERSUS

BOOMTOWN BELLE CASINO
and
LOUISIANA WORKERS' COMPENSATION CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY KATE BAZOR, widow of BEN BAZOR, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This is a claim for benefits brought pursuant to the Longshore and Harbor Workers' Compensation Act [LHWCA], 33 U.S.C. § 901, *et seq.* by Jerry Kate Bazor, widow of Ben Bazor, Petitioner, against Boomtown Belle Casino and Louisiana Workers' Compensation Corp.

The instant matter was referred to the Office of Administrative Law Judges [ALJ] for a hearing that was held on January 26, 2000 in New Orleans, Louisiana. The pertinent issues included herein, as presented by the parties to the ALJ, were the jurisdictional requisites

of *status* and *situs* for coverage under the LHWCA.

On May 4, 2000, the ALJ issued a Decision and Order Awarding Benefits, finding Petitioner satisfied the jurisdictional requirements of *status* and *situs*, finding Petitioner's employment caused his injury and ultimate death, finding Petitioner's stroke of July 13, 1994 left him permanently and totally disabled until his death on October 2, 1997, and awarding Petitioner benefits under the LHWCA.[1]

On July 12, 2000, Respondents filed a timely notice of appeal with the Benefits Review Board [BRB]. After hearing the case, the BRB issued a Decision and Order, dated July 11, 2002, affirming the ALJ Decision. Respondent appealed this decision to the Fifth Circuit Court of Appeals.

On December 6, 2002, the Fifth Circuit Court of Appeals reversed the decision of the BRB holding that Petitioner did not have the employee *status* required by the LHWCA and was not injured at a *situs* covered by the LHWCA.

Petitioner filed a timely petition for rehearing and rehearing en banc that was subsequently denied in an opinion dated January 22, 2003.

JURISDICTION

The authority of the Administrative Law Judge to hear Petitioner's claim for compensation under the LHWCA is granted pursuant to 33 U.S.C. § 919(d).

The Benefits Review Board is vested with authority to hear appeals from decisions of the ALJ pursuant to 33. U.S.C. § 921(3).

The Fifth Circuit Court of Appeals has jurisdiction to hear appeals from the BRB pursuant to 33 U.S.C. § 921 (c).

Appellate jurisdiction of this Court to hear

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[1]ALJ Decision, p.21.

appeals from a decision of the Fifth Circuit Court of Appeals concerning the LHWCA is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 902(3), 902(3)(B), and 903(a)

STATEMENT OF THE CASE

A. *General Background and Description*

Petitioner was hired as a facilities manager by Respondent. Both at the time Petitioner was hired and at the time of his injury, the facilities included a casino vessel which was under construction at Avondale Shipyard in Westwego, Louisiana, a dock under construction located on the Harvey canal, and a parking lot and tent area adjacent to the dock. The tent was to serve as a temporary shelter to house casino patrons as they boarded the vessel until a permanent building was constructed.[2]

Petitioner's duties included getting the above-listed facilities, including the vessel and dock, ready for operation. Subsequent to the vessel's construction and delivery, Petitioner would have been responsible for all maintenance and repair to the vessel, with the exception of the steering, navigation, and power train systems. Consequently, during the vessel's construction and at the time of his injury, Petitioner apportioned his duties to include an on-site learning and understanding of the vessel's design at Avondale Shipyard so that his crew could perform the necessary refrigeration, plumbing, and electrical work, which was to be completed subsequent to delivery.

During the construction phase of the vessel at

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[2] ALJ Decision, p. 4.

Avondale's ship-building facility, Petitioner's duties included the installation and electrical wiring of the vessel's slot machines, computers, and security systems. Respondent, Boomtown Belle Casino, was concerned with the vessel's construction because Avondale was substantially behind schedule and Respondent viewed Avondale's workmanship to be poor.[3] The casino vessel was originally scheduled for delivery and operation on July 4, 1994; however, due to Avondale's delay, the casino did not open until August 6, 1994. Based on these concerns, Respondent directed Petitioner to assign a portion of his work crew to assist Avondale employees in vessel clean-up during the construction and to supervise their work. This was intended to speed the construction of the vessel.

Petitioner was also responsible for the loading facility at the Harvey Canal, a navigable waterway located approximately ten miles from Avondale, which is where the vessel was to be docked. Specifically, Petitioner supervised the construction of the dock and vessel ramp.

Respondent, Boomtown Belle Casino, was concerned because each day that the casino opening was delayed, Respondent lost considerable revenue. As a result, Petitioner was working fifteen hour days, while supervising a maintenance crew that worked twelve hour days making sure that the casino vessel was correctly outfitted with properly wired slot machines.

During the afternoon of July 13, 1994, Petitioner, while sitting in a chair in the tent, collapsed and fell to the ground unconscious. Petitioner was taken to the hospital where he was diagnosed with an aneurysmal subarachnoid hemorrage secondary to a MCA aneurysm. On the same day, Petitioner underwent a right frontal temporal craniectomy, clipping of middle cerebral

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[3] ALJ Decision, p. 5.

bifurcation aneurysm, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. Petitioner never regained consciousness and died on October 2, 1997.[4]

Chester Bruno Scrignar, M.D. determined through medical records and interviews with Petitioner's family members and co-workers that Petitioner suffered from chronic, unrelenting stress, which not only included the increased work hours and responsibilities associated with the vessel during its construction phase, but also included problems encountered by Petitioner and his crew while they assisted Avondale during the vessel's construction.[5] Fellow employees confirmed a heated argument Petitioner had with Avondale Superintendent, Octave Rainey that occurred just prior to his stroke and centered upon the increased number of work hours expected of Petitioner's crew by Avondale.

B. Decision of the Administrative Law Judge

After hearing testimony from numerous witnesses, including co-workers, family members, and doctors, the ALJ determined that Petitioner satisfied the *status* and *situs* requirements for coverage under the LHWCA. Additionally, the ALJ found that Petitioner's injuries were caused by his employment activities and awarded damages accordingly.

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[4]ALJ Decision, p. 5.
[5]ALJ Decision, p. 11.

Specifically, the ALJ found that Petitioner spent a substantial portion of his time in the outfitting and cleaning of the casino vessel at Avondale, and additionally, supervised the dock area and construction of the vessel ramp. Relying on this Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), the ALJ found the *status* requirement was established.[6]

Additionally, the ALJ found the *situs* requirement was met, citing *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980). The ALJ stated that Petitioner's stroke occurred less than 100 feet from the dock and ramp of which he was supervising the construction.

C. Decision of the Benefits Review Board

In affirming the decision of the ALJ, the BRB gave detailed analysis in support of its finding that Petitioner satisfied both the *status* and *situs* requirements for coverage under the LHWCA. Respondent contended that Petitioner was excluded from coverage under the LHWCA, 33 U.S.C. § 902(3)(B), added by congress in 1984, that excludes from the definition of employee individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. Relying on *Caputo*, 432 U.S. 249, *Green v. Vermilion Corp.*, 144 F.3d 332 (1998), and *Huff v. Mike Fink Restaurant*, 33 BRBS 179 (1999), the BRB held that the exclusion did not apply to Petitioner because his duties did not solely further the operation of a "recreational operation" within the plain meaning of that term.[7] Instead, the BRB determined Petitioner's duties furthered maritime commerce.

In addressing the *situs* requirement, the BRB found that due to the cumulative nature of the injury

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[6] ALJ Decision, p. 14-15.
[7] Appendix, p. 20a-21a.

and the fact that the injury resulted from stress Petitioner suffered while working at the Avondale shipyard and the dock facility, Petitioner had satisfied the *situs* requirement for recovery. Because a shipyard and dock are indisputably maritime sites, the BRB affirmed the ALJ's determination that Petitioner satisfied the situs requirement for recovery.[8]

D. Decision of the Fifth Circuit Court of Appeals

The Fifth Circuit Court of Appeals reversed the decision of the BRB and found that Petitioner failed to satisfy both the *status* and *situs* requirements for coverage under the LHWCA. With regard to the *status* requirement, the court found that because a floating casino is a "recreational operation" for purposes of § 902(3)(B), Petitioner was excluded from coverage.[9] In so holding, the Fifth Circuit did not address the cumulative nature of Petitioner's injury and did not mention the threshold requirement under 33 U.S.C. § 902(3)(B) that for the exception to apply, the injured party must be subject to coverage under a State Workers' Compensation Act.

The Fifth Circuit also held that Petitioner's injury did not occur on a covered *situs*. The Court stated that the Boomtown facility had yet to be used for a maritime purpose, and therefore, was not a covered *situs*.[10] The court did not address whether the Avondale shipyard or the dock were covered *situs* locations under the LHWCA.

Petitioner filed a timely Petition for Rehearing and Rehearing en banc, which was denied.

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[8] Appendix, p. 24a.
[9] Appendix, p. 8a.
[10] Appendix, p. 9a.

REASONS FOR GRANTING WRIT

Petitioner, through undersigned counsel, respectfully requests that this Honorable Court grant a Writ of Certiorari to the Fifth Circuit in this matter for the reasons as set forth in this petition. This case concerns the effects, if any, of the 1984 amendments to the Longshore and Harbor Workers' Compensation Act [LHWCA], 33 U.S.C. § 902(3)(A)-(F), in determining whether an employee is covered under the LHWCA. This Court has not had occasion to address the 1984 amendments to § 902(3), and Petitioner firmly believes that the Fifth Circuit has misinterpreted LHWCA § 902(3)(B), and additionally that the decision of the Fifth Circuit in the case at bar will have broad ramifications on employees across the country.

This case also concerns the effects of the Fifth Circuit's determination that *situs*, under the LHWCA, requires a temporal dimension to establish coverage. Th Fifth Circuit's holding is in conflict with the decisions of other circuits, decisions of this Court, and the legislature's intent. This Court has not yet directly addressed whether the specifically enumerated *situs* locations require a temporal dimension, and the Court's determination of this case will settle the conflict that currently exists amongst the circuits.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING THAT PETITIONER FAILED TO MEET THE STATUS REQUIREMENT FOR COVERAGE UNDER THE ACT.

LHWCA § 902(3)(A)-(F) excludes from the definition of "employee" certain classes of workers if the individual is subject to coverage under a state

workers' compensation act.[11] Section 902(3)(B) excludes individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. The legislative history states that the exclusions found in Section 902(3)(B) should be "narrowly construed."[12] The legislative history also states:

> Some enterprises which are provided with exclusion under Section 902(3)(B) and (C) because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed.[13]

The Fifth Circuit held that the vessel was a "recreational operation," and therefore under Section 902(3)(B), Petitioner is not covered under the LHWCA.[14]

A. The Fifth Circuit failed to address the requirement of coverage under a state compensation act.

The plain language of Section 902(3) states that the listed exclusions from coverage are only applicable if the employee is covered under a state workers' compensation remedy. The Fifth Circuit failed to address this requirement in its decision to deny coverage to Petitioner. Instead, the Fifth Circuit treated the exclusion as if it unconditionally modified the definition of employee under the LHWCA. Thus, Petitioner is left without a remedy for his injuries under the LHWCA or Louisiana's Workers' Compensation Act.

[11] 33 U.S.C. § 902(3) (West 2003).
[12] H.R. Rep. 98-570(I), 1984 U.S.C.C.A.N. 2734, 2737.
[13] 1984 U.S.C.C.A.N. at 2737
[14] Appendix, p. 8a.

The BRB found that Petitioner suffered a stroke due to stress caused by his employment duties, and the Fifth Circuit has not disputed this finding. The Louisiana Workers' Compensation Act does not cover perivascular injuries, which includes strokes, caused by mental or emotional stress.[15] The Louisiana Supreme Court has specifically stated that strokes are only compensable when they arise out of physical stress and not when they are related to mental stress.[16] Thus, under Louisiana law, Petitioner is not covered under a state workers' compensation act, and the Fifth Circuit erred in excluding Petitioner from coverage under the LHWCA. This was not a factual error by the Fifth Circuit, as the court failed to even address coverage under a state compensation system as a requirement under Section 902(3)(B).

The ramifications of the failure of the Fifth Circuit to address the requirement contained in Section 902(3) of coverage under a state compensation act are both broad and troublesome. As a result of the decision,

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[15] LA. REV. STAT. ANN 23:1021(7)(e) (West 2003). The Louisiana Workers' Compensation Act states:

> A heart related or perivascular injury, illness, or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless it is demonstrated by clear and convincing evidence: that (i) the physical work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and (ii) the physical work stress or exertion, and not some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness, or death.

LA. REV. STAT. ANN. 23:1021(7)(e) (West 2003).

[16] *Hatcherson v. Diebold, Inc.*, 00-3263 (La. 5/15/01), 784 So. 2d 1284, 1288.

Petitioner, and all future employees that fit under an exception to coverage contained in LHWCA § 902(3)(A)-(F), are left without a remedy for their injuries. This result is contrary to the express intent of congress in including state compensation coverage as an express requirement for exclusion under the LHWCA, as well as Congress' intent that the exclusions should be narrowly construed.

B. Congress did not intend "recreational operation" to include the construction phase of a vessel and dock.

The Fifth Circuit held that because a floating casino is a "recreational operation," Petitioner is not covered by the LHWCA. The court relied on its prior decision in *Green v. Vermilion Corp.*[17] The Decision of the Fifth Circuit in the case at bar is a substantial extension of the holding in *Green*, and results in a sea change in the law regarding *status* under the LHWCA, directly conflicting with this Court's decision *Northeast Marine Terminal Co. v. Caputo.*[18]

In *Green*, the Fifth Circuit had occasion to interpret Section 902(3)(B) with reference to a hunting camp. The Court held that since Green was employed solely to render services to promote and maintain a duck hunting camp, he was excluded from coverage under Section 902(3)(B) of the LHWCA.[19] It was stipulated that Green was covered under the Louisiana Workers' Compensation Act.[20] The court specifically rejected the claim that in construing Section 902(3)(B), it was limited to considering only the nature of the employer's enterprise, and the court quoted the

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[17] 144 F.3d 332 (5th Cir. 1998).
[18] 432 U.S. 249 (1977).
[19] *Green*, 144 F.3d at 334.
[20] *Id.* at 335 n. 1.

legislative history to that effect.[21] The court addressed itself to the question of whether Green worked exclusively to further an operation which comports with the plain meaning of the terms "camp or club."[22] It was implicit in the court's opinion that Green was not engaged in the construction of the camp.

The Fifth Circuit's interpretation of *Green* in the case at bar renders an employee engaged in the *construction* of a club, camp, restaurant, or "recreational operation" excluded from coverage under the LHWCA. In this case, the Fifth Circuit has held that a casino vessel, while under construction, is a "recreational operation" under Section 902(3)(B). However, the court has failed to recognize that during construction there is no recreational operation. Under the Fifth Circuit's interpretation of Section 902(3)(B) in this case an employee building a vessel, dock, terminal, pier, or any other maritime construction operation is excluded from coverage if the object being built is destined to be a "recreational operation." A shipbuilder, constructing a casino vessel or a cruise ship, is not covered under the LHWCA if he is employed by the owner of the vessel. This decision potentially removes numerous employees from coverage under the act, thereby substantially altering the *status* requirement as defined in *Caputo*.[23] Two employees, performing the same tasks but employed by different employers, one employed by the owner of the recreational operation, results in one employee covered under the act while the other is not.

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[21] *Id.* at 335. The court quoted the legislative history stating that businesses falling under Section 902(3)(B) may have employees that should remain covered under the Act "because of the nature of the hazards to which they are exposed." 1984 U.S.C.C.A.N. at 2737.

[22] *Green*, 144 F.3d at 335.

[23] *Caputo*, 432 U.S. at 273.

1. The Fifth Circuit's interpretation of Section 902(3)(B) renders Section 902(3)(F) meaningless.

In 1984, Congress added Sections 902(3)(A)-(F) to the LHWCA. Section 902(3)(F) excludes from the definition of "employee" under the LHWCA "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length." Having enacted Section 902(3)(B) and (F) at the same time, principles of statutory construction would counsel against an interpretation of either Section that renders the other Section meaningless.

However, by interpreting "recreational operation" in Section 902(3)(B) to include the construction phase of a recreational vessel, the Fifth Circuit renders Section 902(3)(F) meaningless. It would be unnecessary to address the construction of a recreational vessel under Section 902(3)(F) if it was covered under Section 902(3)(B). The interpretation of Section 902(3)(B) by the Fifth Circuit, as including the construction of a casino vessel, is in direct conflict with the plain language of Section 902(3)(F).[24] Therefore, Section 902(3)(B) does not address the construction phase of a recreational vessel, and the Fifth Circuit has erred in applying Section 902(3)(B) to the construction of the Boomtown Belle Casino at Avondale shipyards.

Additionally, the Fifth Circuit states that it is not seriously argued whether a floating casino is a "recreational operation" for purposes of Section 902(3)(B). However, a casino vessel is certainly distinguishable from a recreational vessel described in Section 902(3)(F). Section 902(3)(F) is addressed to

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[24]33 U.S.C. § 902(3)(F) (West 2001). Section 902(3)(F) excludes from the definition of employee under the act "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length.

vessels under sixty-five feet in length and likely has reference to vessels not used for commercial purposes. Conversely, a casino vessel is a commercial operation designed to pick-up gamblers (customers) and travel the waterways while the customers gamble. While from the customer's perspective this may be a recreational activity, from the perspective of the owner of the vessel and those constructing it, this is commercial activity on the navigable waterways.

2. The decision of the Fifth Circuit conflicts with this Court's decision in Caputo.

In *Caputo*, this Court held that the Act focuses primarily on occupations, including shipbuilders.[25] Additionally, the *status* test focuses on the claimant's overall duties; thus, an employee is covered under the Act if he spends some of his time engaged in a covered activity.[26] The language of the 1972 amendments is broad and suggests an expansive view of the extended coverage.[27] Court's have consistently held that land-based employees specifically mentioned under Section 902(3) are covered under the LHWCA.[28]

Therefore, the Fifth Circuit has erroneously interpreted Section 902(3)(B) because the court's interpretation is contrary to the plain language of the LHWCA, conflicts with prior decisions of this Court, and is untenable in that it creates a gap in coverage contrary to congressional intent. Additionally, the Fifth Circuit's interpretation of Section 902(3)(B) renders Section 902(3)(F) meaningless, and therefore, cannot be the

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[25] *Caputo*, 432 U.S. at 273.

[26] *Id.* at 273; *Pfeiffer v. Ford*, 444 U.S. 69, 75 (1979); *See also Nelson v. American Dredging Co.*, 143 F.3d 789, 799 (3d Cir. 1998).

[27] *Id.* at 268.

[28] *Chesapeake and O.R. Co. v. Schwalb*, 493 U.S. 40, 46 (1989); *Sea-Land Service,Inc. v. Rock*, 953 F.2d 56, 65 (3d Cir. 1992)

interpretation Congress intended. Finally, under the Fifth Circuit's decision, Petitioner is left with no remedy for his injuries because the court did not even address the threshold requirement of a state workers' compensation remedy for Section 902(3)(B) to apply.

II. THE FIFTH CIRCUIT ERRONEOUSLY STATES AND APPLIES THE LAW OF "SITUS."

Prior to its 1972 Congressional amendment, 33 U.S.C. § 903(a) specified that the LHWCA would only compensate injuries or death occurring "upon the navigable waters of the United States." Because the courts subjected the provision to strict statutory construction, coverage under the Act often ceased at the water's edge. To statutorily expand the areas triggering compensation, Congress amended the statute, in pertinent part, to read:

> Compensation shall be payable under this Act in respect of disability of death...but only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel...*[29]

Since the amendment, the courts have consistently held, per this Court's holding in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977), that the amendment "must be liberally construed in conformance with its purpose, and in a way which

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[29] 33 U.S.C. § 903(a) (West 2001) (emphasis added).

avoids harsh and incongruous results." However, disagreement among the Circuit Courts exists, among other issues, in construing the statutory language "*customarily used* by an employee in loading, unloading, repairing, or building a vessel." The Ninth Circuit and the Second Circuit hold that the phrase modifies only "other adjoining areas."[30] The Fifth Circuit, however, holds that the situs of the injury must be one "customarily used" regardless of whether it is specifically enumerated.[31] Additionally, the Fifth Circuit takes the inquiry one step further.

Although this Court has expressly stated that the *situs* test is "geographic" and that it is the *status* test that focuses on "occupational" factors such as loading and unloading, the Court of Appeals for the Fifth Circuit has erroneously required a "temporal" aspect to exist in the specifically listed *situs* at the time of the injury.[32] That is, the Fifth Circuit has determined that the situs inquiry has both a "geographic dimension" and a "temporal dimension," and applies an "actual use" test, requiring the situs to be used for loading, unloading, or building a vessel at the actual time of a claimant's injury. However, this court, in *Caputo*, stated that it is "not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas.'"[33]

In so holding, the Circuit has misstated the law for two reasons: (A) requiring a temporal dimension to specifically enumerated areas erroneously construes the words "customarily used" as modifying the specifically enumerated areas; and (B) requiring a temporal

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[30]*Hurston v. Director, Office of Workers Comp. Programs*, 9889 F.2d 1547, 1552 (9th Cir. 1993); *Fleischmann v. Director, Office of Workers' Comp.*, 137 F.3d 131, 138-39 (2d Cir. 1998).

[31]Appendix, p. 9a.

[32]Appendix, p. 9a.

[33]*Caputo*, 432 U.S. at 280.

dimension to such areas clearly defeats the legislative purpose behind the Act in cases of cumulative injury and ignores the "zone of special danger" doctrine as put forth by the United States Supreme Court. Additionally, Petitioner maintains that the "temporal dimension" rule produces harsh and incongruous results.

> *A. The Fifth Circuit's decision to construe the words" customarily used" as modifying the specifically enumerated areas of 33 U.S.C.A. § 903(a) is in conflict with other circuit decisions, the reasoning of the United States Supreme Court, and the legislative purpose in expanding situs coverage.*

Petitioner clearly meets the situs element as his injuries occurred at the dock and at the shipyard. Because this finding was not discussed or disturbed by the Fifth Circuit, it must be assumed that the court thought it was supported by substantial evidence. However, although resolution of a situs issue normally involves a geographic inquiry, the decision below enunciated that "whether an adjoining area is a Section 903(a) situs is determined by the nature of the adjoining area at the time of the injury."[34] As applied to the instant case, the Fifth Circuit construes the language "customarily used" to modify two of the specifically enumerated areas in the statute. However, this reading of the statute is in conflict with the Ninth Circuit, the Second Circuit, and this Court's reasoning in *Caputo*, that, although the statute is ambiguous, the legislative history evidences "little concern with respect to how [the] facilities were used."[35]

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[34]Appendix, p. 9a (citing *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39, 41 (1995)).

[35]*Caputo*, 432 U.S. at 280; *See Hurston*, 989 F.2d at 1552 (holding that "customarily used" does not modify enumerated structures and

As this Court has stated, the statute is ambiguous, and, therefore, the legislature's intent is an appropriate inquiry.[36] Additionally, this Court has observed that the legislative history describes the statute as expanding coverage to areas other than the ship and that the legislative history evidences "little concern with respect to how these facilities were used."[37] Further, this Court has held that the language of the 1972 amendments is broad and suggests an expansive view of the extended coverage.[38] This Court has also held that the amendment must be liberally construed to avoid harsh and incongruous results.[39] Because the Fifth Circuit's reading of the statute takes a strict, narrow view of the extended coverage, this Court should authoritatively adopt the rule as articulated in the Ninth and Second Circuits that "customarily used" modifies only the words "other adjoining areas." Additionally, this Court should adopt the aforementioned interpretation because the Fifth Circuit rule results in a harsh result for claimants that suffer cumulative injuries on a covered *situs*.

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finding that a structure used only for storing and processing oil did constitute a "pier" under the statute); *See also*, *Fleischmann*, 137 F.3d at 138-39 (adopting the Ninth Circuit's holding and broadly construing "pier" to constitute a bulkhead in order to preserve the legislative preference for claimants not walking in and out of coverage).

[36] *Caputo*, 432 U.S. at 280.

[37] *Id.*

[38] *Id.* at 268.

[39] *Id.*

B. The Fifth Circuit's Application of a Temporal Dimension Test Implies a Causal Element to the Situs Inquiry in the Cases of Cumulative Injury and Ignores the Zone of Special Danger Doctrine as Put Forth by this Court.

An additional error in the court's application of a "temporal dimension" to the instant case is that the court focused on the fact that petitioner's body fell under the "tent," fifty feet from the water's edge, thereby ignoring the cumulative aspect of petitioner's injury recognized by the BRB.[40] In focusing on where petitioner's body fell, the court ignores the "zone of special danger" doctrine as put forth by this Court, and impliedly requires an additional causal element within the situs inquiry. As noted by this Court, the 1972 Amendments expanded the covered situs, added status to the test for eligibility, and left the definition of "injury" intact as "accidental injury or death arising out of and in the course of employment."[41] This Court has also noted Congress' express desire to make coverage available to those who regularly move from covered to noncovered areas.[42] Finally, this Court has held that coverage requires only that "the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose."[43]

The decision below focuses on where petitioner's body fell and not on the fact that the obligations and conditions of petitioner's employment caused him to move from covered to noncovered areas *and* caused his stress-related cumulative injury. Petitioner was not "so thoroughly disconnected from the service of his

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[40] Appendix, p. 24a.
[41] *Herb's Welding v. Gray*, 470 U.S. 414 (1985).
[42] *Id.* at 426.
[43] *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951).

Employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment."[44] Requiring a temporal dimension in the instant case, then, implies an additional causal element to the situs test. It also produces an incongruous, inequitable result, as petitioner clearly suffered injury at areas constituting a "situs" under the act. Thus, the temporal dimension inquiry is an inappropriate one, in that it requires petitioner to have fallen at a specifically covered situs that was at the time "customarily used." Under the Fifth Circuit rule, claimants will obtain coverage for cumulative injury only when they fall in such an area, resulting in claimants slipping in and out of coverage contrary to the legislature's purpose in amending the Act. Because the rule applies an additional causal element to the situs test, ignores the zone of special danger doctrine, and results in claimants slipping in and out of coverage, this Court should hold that the "situs" element of a claimant's coverage under the Act does not require a temporal dimension to the injury.

Thus, Petitioner clearly meets the situs element of coverage under the Act, as his injuries occurred at specifically enumerated covered locations. Therefore, the Fifth Circuit's decision regarding Petitioner's situs should be reversed, as the court's temporal dimension rule conflicts with other circuits, the reasoning of this Court, and the legislative purpose in expanding situs coverage. The decision should also be reversed, as the court failed to consider the cumulative nature of Petitioner's injuries, thereby implying an additional causal element to the situs inquiry and ignoring the zone of special danger doctrine put forth by this Court.

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[44] *O'Leary*, 340 U.S. at 472.

CONCLUSION

THEREFORE, Petitioner Jerry Kate Bazor requests of this Honorable Court that it GRANT her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED,

Lloyd N. Frischhertz
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(Footnotes trail end of each document)
No. 01-60705

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOOMTOWN BELLE CASINO; LOUISIANA WORKERS' COMPENSATION CORPORATION,
Petitioners,

v.

JERRY KATE BAZOR, Widow of Ben Bazor; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY,
Respondents.

12/6/2002

COUNSEL:
For BOOMTOWN BELLE CASINO, LOUSIANA WORKERS' COMPENSATION CORP, Petitioners: David Keith Johnson, Johnson, Stiltner & Rahman, Baton Rouge, LA.

For JERRY KATE BAZOR, Respondent: Lloyd N Frischhertz, Marcus James Poulliard, Firschhertz & Associates, New Orleans, LA.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR, Respondent: Thomas O Shepherd, Jr, Clerk, Washington, DC. Carol A De Deo, Kristin M Dadey, US Department of Labor, Washington, DC. Micahel O Brewer, US Department of Labor, New Orleans, LA.

For GREAT-WEST LIFE ANNUITY, INSURANCE CO, Respondent: Elizabeth S Wheeler, King, LeBlanc & Bland, New Orleans, LA.

JUDGES:
Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH, * District Judge.

OPINIONBY:
Edith Brown Clement

OPINION:

EDITH BROWN CLEMENT:

Petitioner Boomtown Belle Casino ("Boomtown") asks this Court to set aside the Benefit Review Board's order affirming the award of compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), *33 U.S.C. 901 et seq.*, to Jerry Kate Bazor ("Bazor"), widow of Ben Bazor ("the Decedent"), and reimbursement to the Decedent's health insurer, Great-West Life and Annuity Insurance Company ("Great-West"). We reverse for two independent, legally sufficient reasons: Decedent did not have the employee "status" required by the LHWCA and Decedent was not injured at a "situs" covered by the LHWCA.

I. BACKGROUND

Boomtown hired Ben Bazor as chief engineer of the "Boomtown facility," the land-based operations of the casino. The Boomtown facility comprises a personnel office, one or two warehouses, and a "main" building. The casino itself occupies a boat floating in the Harvey Canal in Harvey, Louisiana. At all times pertinent to this suit, the "main" building was yet to be completed, the

Boomtown facility included a "temporary tent," and the casino boat was under construction at the Avondale shipyard and had not yet been moored at the Boomtown facility. Apparently, the temporary tent was to provide a waiting area for casino patrons after the boat was in place but before the main building was operational.

Mr. Bazor worked 40-hour weeks for his first month of employment. Beginning in his second month, Mr. Bazor worked 10-12 hours per day in preparation for the casino opening. As chief engineer, Mr. Bazor was ultimately responsible for the work of supervisors and employees in the housekeeping, maintenance, and outside grounds departments, some of whom Mr. Bazor hired during his tenure. Some of the workers under Mr. Bazor's supervision wired slot machines, data processing equipment, and security systems on the vessel while it was at Avondale. Others cleaned the boat. At some point, Mr. Bazor oversaw work to lower the point where the gangplank attached to the dock, ensuring the gangplank would not be too steep when the boat fell with the tide. Once in operation, Mr. Bazor's responsibilities on board the casino were to include general maintenance. In preparation for such responsibilities, Mr. Bazor regularly visited the Avondale shipyard to note the position of wires and pipes before Avondale workers enclosed them in walls.

Eight days into his second month of employment, Mr. Bazor collapsed while under the temporary tent. Mr. Bazor was diagnosed with an aneurysmal subarachnoid hemorrhage, or stroke. Mr. Bazor never regained consciousness. He remained in intensive care for approximately forty-eight days and died in a nursing home roughly three years later. Great-West paid over $ 600,000 in medical expenses to and on behalf of Mr. Bazor and his family.

Bazor brought a LHWCA claim for permanent total disability benefits, pursuant to *33 U.S.C. 908*(a), and death benefits, pursuant to 909. Great-West intervened and requested reimbursement.

The Administrative Law Judge ("ALJ") held Bazor satisfied the status and situs requirements, predicates to LHWCA coverage under 902(3) and 903(a), respectively. The ALJ awarded benefits to Bazor, reimbursement to Great-West, and attorney's fees to them both.

Boomtown and the Louisiana Workers' Compensation Corporation ("LWCC") appealed to the Benefits Review Board ("BRB"). The BRB affirmed. Boomtown and LWCC appealed to this Court, pursuant to 921(c).

II. STANDARD OF REVIEW

This Court upholds BRB decisions that are supported by substantial evidence and in accordance with law. *Empire United Stevedores v. Gatlin, 936 F.2d 819, 822 (5th Cir. 1991).* We review the determination of LHWCA coverage by either an ALJ or the BRB as a question of law. *Hullinghorst Indus., Inc. v. Carroll, 650 F.2d 750, 753 (5th Cir. Unit A July 1981).*

III. DISCUSSION

A claimant must satisfy both a status and a situs requirement in order to qualify for LHWCA coverage. *Director v. Perini N. River Assocs., 459 U.S. 297, 314, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983).*

A. STATUS REQUIREMENT

The LHWCA covers longshoremen and harbor workers, but excludes some individuals for various reasons:

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include–

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

. . . .

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

902(3). Congress added 902(3)(A)-(F) to the LHWCA in 1984.

Boomtown argues that whether an employee is excluded from coverage under 902(3)(B) is determined entirely by the nature of his or her employer. See *Arnest v. Miss. River Boat, Ltd.*, *29 BRBS 423*(ALJ), 425(ALJ) (1995) (noting the "absurdity" that a Biloxi Belle Casino's pit manager/floor supervisor, but not the casino's bartenders and gift shop sales clerks, would be

covered by the LHWCA); *Peters v. Roy Anderson Bldg. Corp., 29 BRBS 437*(ALJ), 442(ALJ) (1995) (granting a ship cleaner LHWCA coverage because her employer, a general contractor, was not expressly excluded by statute). Boomtown asserts that because a casino is a "recreational operation," its employees are categorically denied LHWCA coverage under 902(3)(B). The law is more nuanced than Boomtown acknowledges.

In Green v. Vermillion Corp., this Court looked at the club and camp exceptions in 902(3)(B). *144 F.3d 332, 335 (5th Cir. 1998)*. Green worked as cook, watchman, and general repairman at a hunting camp but was employed by a corporate entity with operations from trapping alligators to rice farming. Green sought LHWCA coverage, arguing 902(3)(B)'s club or camp exclusion did not apply because he was not an individual *employed by* a club or camp. Id. The district court rejected this argument, stating such a "construction of 902(3)(B) renders the exception meaningless in today's world of business organizations." Id. We affirmed and provided a test in situations of conglomerate employers. "Green worked *exclusively to further an operation which comports with the plain meaning* of the terms 'camp' and 'club.' . . . Since Green was employed *solely to render services to promote and maintain* a duck camp, we hold that he is excluded from LHWCA coverage under 902(3)(B)." Id. (emphasis added). In passing, Green noted the legislative history of the Act's 1984 amendments did not alter its conclusion. Id.[2]

Bazor resists the plain language of 902(3)(B) with the legislative history mentioned in Green, and with *Huff v. Mike Fink Restaurant, Benson's Inc., 33 BRBS 179 (1999)*. Huff, the BRB's first opportunity to address the 902(3)(B) exclusion, *id. at 181*, rejected a categorical exemption from coverage for individuals

employed by entities listed in 902(3)(B). *Id. at 185.* Instead, Huff adopted for status inquiries under 902(3)(B) the status test developed prior to the 1984 amendments: "in determining whether a claimant is a covered maritime employee under the Act, the inquiry centers on the claimant's assignable duties at the time of injury, not the corporate purpose or structure of the employer." *Id. at 185;* see generally *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 269-74, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977)* (analyzing 902(3)(B)). The BRB found its reasoning in *Shano v. Rene Cross Construction, 32 BRBS 221 (1998)* (adopting Caputo test for 902(3)(C) inquiries) persuasive, and cited Green as support for its conclusion. *Huff, 33 BRBS at 185.*

We agree with Boomtown that the 902(3)(B) coverage exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs. The plain language of 902(3)(B) excludes from coverage "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet" without reference to the nature of the work they do. Accord 1984 U.S.C.C.A.N. at 2737 (Paragraphs 902(3)(B) and (C) "exclude employees because of the nature of the employing enterprise, as opposed to the exclusions in paragraph 2(3)(A), which are based on the nature of the work which the employee is performing."). It is true the legislative history states "that some enterprises which are provided with exclusions under sections [902(3)(B) and (C)] because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed." Id. But the statute itself carves away the coverage exception based upon the nature of an employee's work

only in 902(3)(C), with respect to individuals employed by a marina. Hence, we are not persuaded by Huff's adoption of Shano's reasoning for 902(3)(B), where Congress declined to carve away the coverage exception.

The parties did not seriously argue whether a floating casino is a "recreational operation" for purposes of 902(3)(B). We hold that it is. Consequently, Decedent is not covered by the LHWCA. Even if we entertained the idea that Boomtown was a conglomerate with multiple business endeavors, one of which was longshoring, Decedent does not satisfy the status requirement under the Green test. Decedent was hired as the chief engineer of the Boomtown facility. All of his duties of (1) maintaining the Boomtown facility, (2) sending employees to wire slot machines, data processing equipment, and security systems, and (3) sending employees to clean the boat, exclusively furthered the operation of the casino. Under the language of the statute, Decedent, as an employee of a recreational operation, is not covered by the LHWCA even if some of his duties expose him to the hazards associated with maritime commerce.

B. SITUS REQUIREMENT

Boomtown contends Decedent does not satisfy the situs requirement of the LHWCA. We agree. The LHWCA provides a recovery

if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area

customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a) .

Whether an adjoining area is a 903(a) situs is determined by the nature of the adjoining area at the time of injury. See *Nelson v. Guy F. Atkinson Constr. Co., 29 BRBS 39, 41 (1995)* (holding that powderman injured while digging a lock on the Columbia River did not satisfy the "situs" element because the site had yet to be used for maritime commerce). At the time of Decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Bazor seeks to avoid this result with an early Fifth Circuit case proposing that the situs requirement is governed by whether the situs "clearly played an integral role in employer's overall maritime enterprise thereby qualifying as an adjoining area under the Act." *Texports Stevedore Co. v. Winchester, 632 F.2d 504, 507-508 (5th Cir. 1980).* Bazor notes the tent's integral role in Boomtown's operation: the tent was within 50-300 feet of the Harvey Canal, the tent was to be used for passengers waiting to embark, and the tent and vessel were to be connected by a covered walkway. Bazor's appeal to the broad language in Texports is unavailing, as that case considered the geographic dimension to "adjoining areas" and not the temporal dimension.

IV. CONCLUSION

For the reasons stated, we reverse the order of the Benefits Review Board.

REVERSED.

Footnotes

* District Judge of the Western District of Texas, sitting by designation.

n2 The legislative history states: "some enterprises which are provided with exclusions under sections [902(3)(B) and (C)] because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. REP. NO. 98-570, pt. 1, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2737.

No. 01-60705

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOOMTOWN BELLE CASINO; LOUISIANA WORKERS' COMPENSATION CORPORATION,
Petitioners

v.

JERRY KATE BAZOR, Widow of Ben Bazor; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY,
Respondents

January 22, 2003, Filed

JUDGES:
Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH, District Judge. *.

OPINIONBY:
Edith B. Clement

OPINION:

ON PETITION FOR REHEARING EN BANC

Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH, District Judge. *

PER CURIAM:

(Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

E.B. Clement

United States Circuit Judge

Footnotes

* District Judge of the Western District of Texas, sitting by designation.

BRB No. 00-0928B

U.S. Department of Labor Benefits Review Board

JERRY KATE BAZOR (Widow of BEN BAZOR)
Claimant-Respondent

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORPORATION
Employer/Carrier- Petitioners and

GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY Intervenor

July 11, 2001

COUNSEL:

Marcus J. Poulliard (Seelig, Cosse, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

David K. Johnson (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Elizabeth S. Wheeler (King, Leblanc & Bland, L.L.P.), New Orleans, Louisiana, for intervenor.

APPEAL: Appeal of the Decision and Order Awarding Benefits and the Supplemental Decisions and Orders Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

OPINION:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decisions and Orders Awarding Attorney Fees (99-LHC-1198) of Administrative Law Judge Clement J. Kennington

rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. § 921 (b)(3).

Decedent was a facilities manager for the Boomtown Belle Casino boat. At the time decedent was employed, the vessel was under construction at the Avondale Shipyard. It was overdue for completion, and decedent divided his time between employer's facility preparing the dock and loading areas, and the shipyard, where decedent oversaw the cleaning of the vessel and installation of wiring for the gambling machines, computers and security system. On July 13, 1994, decedent collapsed and fell to the ground unconscious, in the tent area near the dock. He was taken by ambulance to the hospital where he was treated and diagnosed with an aneursymal subarachnoid hemorrhage secondary to a MCA aneurysm (a stroke). On the same date, decedent underwent a right frontal temporal craniectomy, clipping of the middle cerebral bifurcation aneurys, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. Decedent never regained consciousness and continued to receive care in hospitals, at home with 24 hour nursing care, and in a nursing home until his death on October 2, 1997. Decedent's medical bills were paid by a health insurance policy he obtained upon being hired, underwritten by Great-West Life & Annuity Insurance Company (the intervenor). Claimant, decedent's widow, sought decedent's permanent total disability benefits under the Act for the period from July 13, 1994 to October 1, 1997, 33 U.S.C. § 908(a), and death benefits

pursuant to Section 9, 33 U.S.C. § 909, thereafter.

In his Decision and Order, the administrative law judge found that decedent spent a substantial portion of his time outfitting and cleaning the casino vessel. In addition, he found that decedent was responsible for maintenance and repair of the tent and dock area and in fact had supervised the reconstruction of the vessel ramp. Therefore, he found that decedent met the status requirement of the Act, and was not excluded from coverage under the Act by virtue of Section 2(3)(B), 33 U.S.C. § 902(3)(B). The administrative law judge also found that the tent and dock area where decedent had his stroke was within 100 feet of the Harvey Canal, a navigable waterway, and constituted the only area from which passengers could embark or disembark the casino vessel. Therefore, he concluded that the Act's situs requirement was met. 33 U.S.C. § 903(a).

In considering whether decedent's injury and death were work-related, the administrative law judge found that the evidence is sufficient to establish invocation of the Section 20(a), 33 U.S.C. § 920(a), presumption that the stroke was causally related to the long hours and stress of decedent's employment responsibilities. Thus, as he found that there is no credible evidence to rebut these facts, the administrative law judge concluded that decedent's work had a direct link to, and was at least an aggravating factor in, the stroke. Consequently, the administrative law judge awarded claimant permanent total disability benefits and death benefits. The administrative law judge also considered the intervenor's claim for reimbursement of the medical bills paid during decedent's period of disability ($606,306.64). He noted that employer had knowledge of the medical treatment decedent needed and informed claimant to seek coverage from the intervenor. Thus,

the administrative law judge found that the intervenor has a right of reimbursement from employer for treatment which it provided, but does not have a lien on claimant's compensation.

In an Order on Reconsideration, the administrative law judge found that the intervenor is entitled to an attorney's fee and interest payable by employer. Subsequently, claimant's attorney filed for an attorney's fee requesting a fee from both employer and the intervenor. The administrative law judge discussed employer's objections to the petition filed by claimant's counsel, but found that the charges contained in the fee application were for necessary services which are reasonable in amount and thus awarded claimant's counsel a fee of $27,096.07, representing $24,492.50 in attorney's fees and expenses in the amount of $2,603.48, payable by employer. In a Supplemental Decision and Order Denying Attorney Fees, the administrative law judge found that there is no authority to allow claimant to recover an attorney's fee from the intervenor and thus denied further fees. Counsel for the intervenor also filed a fee petition for work performed before the administrative law judge. The administrative law judge noted that employer did not file objections to this petition. Therefore, as he found the services rendered to be reasonable and necessary, the administrative law judge awarded intervenor's counsel a fee in the amount of $24,492.50 for legal services and $2,603.48 for expenses, to be paid by employer.

On appeal, employer contends that the administrative law judge erred in finding coverage under the Act. n1 Employer maintains that decedent's employment is excluded from coverage as he was an employee of a casino, a recreational operation, see 33 U.S.C. § 902(3)(B), and that the tent where the stroke occurred is

not a covered situs. In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to invoke the Section 20(a) presumption. Employer also avers that it should not be responsible for medical benefits because it did not receive ongoing medical reports from the intervenor and claimant did not request a change in physicians. Lastly, employer contends that the administrative law judge's attorney's fee award to claimant's counsel should be substantially reduced, and that the administrative law judge erred in awarding a fee to the intervenor's counsel. Claimant responds, urging affirmance of the administrative law judge's decisions. The intervenor also responds, urging affirmance of the administrative law judge's award of an attorney's fee to be paid by employer.

Status

Initially, employer contends that the administrative law judge erred in finding that decedent was not excluded from coverage as an employee of a recreational operation. Section 2(3) states in pertinent part:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-

* * *

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

* * *

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3); see also 20 C.F.R. § 701.301(a)(12)(iii)(B). The United States Court of Appeals for the Fifth Circuit has considered a case under Section 2(3)(B), Green v. Vermilion Corp., 144 F.3d 332, 32 BRBS 180(CRT) (5<th> Cir. 1998), cert. denied, 119 S.Ct. 1251 (1999). In Green, claimant was employed at a duck camp located on marsh land near a private canal off a bayou. During the three-month duck season, the claimant worked as both a cook and watchman. During the rest of the year, he was a watchman and general maintenance worker. He lived at the camp Monday through Friday, and his mode of transportation to and from the camp was by boat. He occasionally assisted in mooring and unloading supply boats that docked at the camp. Claimant was injured on the deck of a vessel while assisting in its mooring. The district court granted employer's motion for summary judgment on the Longshore Act claim on the ground that the claimant was excluded under the Section 2(3)(B) "club/camp" exception and claimant appealed to the Fifth Circuit. The Fifth Circuit held that as the claimant was employed exclusively and solely to render services to promote and maintain a duck camp, he was excluded from coverage. Green, 144 F.3d at 335, 32 BRBS at 182 (CRT).

In Huff v. Mike Fink Restaurant, Benson's Inc., 33 BRBS 179 (1999), the Board considered a case in which the claimant was employed as a harbor master for a company which owned several river cruising passenger vessels, barges, tugboats, water taxis, and docks. At the time of the injury, the claimant was the harbor master for the Mike Fink, a 160-foot paddle-wheel, permanently

moored vessel used a restaurant. The claimant's duties consisted of maintaining the exterior of the property owned by Mike Fink, Incorporated: the parking lot, the vessel, and the dock. Initially, the Board held that all employees of a restaurant are not excluded from coverage regardless of the duties they perform, but rather the nature of the duties to which claimant is or may be assigned remains relevant under Section 2(3)(B). See Huff, 33 BRBS at 184, citing Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Specifically, the Board held that "the focus is properly on claimant's overall job duties and whether they further the operation of a restaurant within the plain meaning of that term, or whether they are duties that further maritime commerce and expose the claimant to maritime hazards." Huff, 33 BRBS at 185. The Board noted claimant's duties of repairing and enlarging the dock, and the fact that he was responsible for the safety of the dock and the pleasure crafts moored there. Thus, the Board held that as claimant's duties furthered maritime commerce on the Ohio River, and were not solely and exclusively in furtherance of a restaurant within the plain meaning of that term, the claimant was not excluded from coverage under the Act. Id.

Employer initially contends that the nature of the employer's business determines whether decedent is excluded from coverage under Section 2(3)(B). This contention, however, has been rejected by the Board, see Huff, 33 BRBS at 184, and is borne out by the legislative history of the 1984 Amendments as discussed in Huff, id., citing 1984 U.S.C.C.A.N. at 2737. Moreover, in Green, the Fifth Circuit cited this legislative history, stating:

businesses falling under this paragraph (B) may have

employees that should remain covered under the Act 'because of the nature of the work which they do, or the nature of the hazards to which they are exposed.' By the same token, we believe the opposite is true–clubs and camps may employ individuals who should not be covered under the LHWCA because their job responsibilities do not, or only minutely, involve maritime activities and they are not exposed to hazards associated with traditional maritime activities.

Green, 144 F.3d at 334, 32 BRBS at 182 (CRT)(citation omitted). Thus, in Green, the court also held that it is the nature of claimant's duties, and whether they involve maritime activities and hazards, which is dispositive. Similarly, the Board held in Shano v. Rene Cross Construction, 32 BRBS 221 (1998), a case involving the marina exclusion at Section 2(3)(C), that the inquiry centers on the claimant's assignable duties at the time of the injury, not the corporate purpose or structure of the employer. Id. at 223. Thus, we reject employer's contention that decedent is excluded from the Act's coverage merely because he was employed by a casino.

Employer also contends that all of decedent's duties were related to the gambling enterprise, and thus that he is excluded from coverage on this basis. The administrative law judge rejected this contention and found that "[decedent's] work was essentially linked to vessel construction or outfitting which included installation and wiring of gambling equipment and vessel cleaning prior to delivery with subsequent maintenance and repair following delivery and hence had a substantial connection to maritime commerce." Decision and Order at 15. The record indicates that decedent was hired to be the facilities manager before the launch of the Boomtown Belle as a casino. The project was experiencing delays at the Avondale

Shipyard, and decedent was under pressure by his employers to see the boat expeditiously completed. Thus, decedent frequently supervised work at the shipyard, bringing his own employees to work on the vessel under construction. The crew was responsible for installing wiring for slot machines, as well as installing a battery back-up should power be lost to the boat. Cl. Ex. 16 at 14. In addition, decedent supervised the engineer responsible for the vessel's air conditioning system and for running the data lines from the slot machines to the vessel's computers. Decedent also oversaw vessel plumbing, electrical, refrigeration and lighting activities, Cl. Ex. 20 at 59, and was involved with cleaning the vessel at the Avondale yard. Mr. Banks, decedent's co-worker and successor, testified they were responsible for all vessel maintenance excepted steering, navigation and power train components. Cl. Ex. 20 at 59. The administrative law judge also found that decedent was responsible for maintenance and repair of the tent and dock area, and had supervised the reconstruction of the vessel ramp at the dock. See Cl. Ex. 20 at 58-59.

In order to determine whether decedent is excluded from coverage by Section 2(3)(B) of the Act, the focus is properly on decedent's overall job duties and whether they furthered the operation of a "recreational operation" within the plain meaning of that term, or whether they are duties that further maritime commerce and exposed decedent to maritime hazards. Huff, 33 BRBS at 185. In the present case, decedent's duties were performed prior to the completion of the vessel, and thus are properly characterized as "shipbuilding" activities. Decedent was involved solely in the vessel construction phase, and there is no exclusion for employees involved in the construction of a recreational vessel unless it is under 18 tons net. n2 See 33 U.S.C. §

902(3)(H). Mr. Creighton, one of decedent's co-workers, testified that he worked with decedent in removing trash from the vessel while it was under construction and cleaning the vessel prior to delivery, which are duties covered under the Act. See Ruffin v. Newport News Shipbuilding & Dry Dock Co., 34 BRBS 153 (2000); see also Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96(CRT) (1989); Tr. at 136. As discussed, decedent oversaw many aspects of the vessel's construction as it neared completion at the Avondale yard. We reject, in addition, employer's contention that decedent's duties wiring the vessel for slot machines, data processing and security systems preclude decedent's coverage under the Act. Electrical wiring is part of the vessel's construction, see generally Barton v. Litton Systems, Inc., Ingalls Shipbuilding, Inc., 6 BRBS 92 (1977), and there are no restrictions against coverage for a shipbuilder based on the area of the vessel in which he is working or its intended purpose. Finally, decedent also was responsible for maintaining the dock and loading area for the passengers, duties which expose a claimant to traditional maritime hazards.

To briefly summarize, decedent's duties in the present case were performed prior to the vessel's being completed and placed into operation as a casino. At the time of decedent's injury and at all times prior, the vessel was under construction. Decedent was thus not involved in a recreational operation, but a shipbuilding operation at all times when he worked on the vessel. See generally Mackey v. Bay City Marine, Inc., 23 BRBS 332 (1990). The fact that he also worked on land in maintaining employer's other facilities is not controlling, as he spent "at least some of his time" in maritime employment. See Caputo, 432 U.S. 249, 6 BRBS 150; see also McGoey v. Chiquita Brand Int'l, 30 BRBS 237 (1997). The fact employer is a casino operation also is

not controlling, as it is the nature of the employee's work which controls and Green and Huff recognize that employers in the categories of exclusion under Section 2(3)(B) would have some covered workers. Therefore, we affirm the administrative law judge's finding that decedent was a covered employee as it is supported by substantial evidence and in accordance with law.

Situs

Employer also contends that the administrative law judge erred in finding that decedent was injured on a covered situs. Section 3(a) provides that

compensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). Coverage under Section 3(a) is determined by the nature of the place of work at the time of injury. See Eckhoff v. Dog River Marina & Boat Works, Inc., 28 BRBS 51 (1994). In the present case, decedent suffered a stroke while in the tent located between the parking lot and the dock, which would be used to house the passengers prior to their embarking the vessel. It is not disputed that this dock was on the navigable waters of the Harvey Canal and that the tent joined the dock. See Cl. Ex. 20 at 49. The administrative law judge found the situs requirement met as the area was used for loading and unloading passengers. Employer's contention on appeal is that the area was not used for maritime commerce because the "loading" of passengers on a gambling vessel is not

maritime commerce.

We need not determine whether the "loading" of passengers onto a vessel constitutes "loading" within the meaning of Section 3(a). The conclusion that the situs element is met is affirmed, based on the cumulative nature of decedent's injury. The administrative law judge found that decedent's stroke was due, in part, to the stresses he suffered while working at the Avondale shipyard and the dock facility. A shipyard is a covered situs, see generally Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), aff'g 21 BRBS 83 (1988), cert. denied, 493 U.S. 1070 (1990); Martin v. Kaiser Co. Inc., 24 BRBS 112 (1990), as is a dock. See 33 U.S.C. § 903(a); Eckhoff, 28 BRBS 51. As decedent was subjected to work stresses in area that are indisputably maritime sites, we affirm the administrative law judge's conclusion that the situs element of Section 3(a) is satisfied.

Causation

Employer next contends that the administrative law judge erred in finding that the evidence is sufficient to establish invocation of the Section 20(a) presumption that decedent's injury and death were work-related and that employer failed to rebut the presumption. Section 20(a) provides a presumption that decedent's injury was causally related to his employment, if claimant establishes that decedent had a physical harm, and that an accident occurred or working conditions existed that could have caused the harm. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that decedent's disabling condition and death were not caused or aggravated by his employment. Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187(CRT) (5<th> Cir. 1999);

Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976).

In the instant case, the record contains the opinion of Dr. Scrignar, a forensic psychiatrist, who testified in a deposition that stress causes elevated heart rates, blood pressure, headaches and weight loss and forms the genesis of a cerebral vascular accident. Dr. Scrignar opined that decedent was subjected to excessive responsibilities at work without the necessary help which combined with a natural conscientiousness which eventually led to or contributed to his stroke. The evidence also includes the opinion of Dr. Tong, a neurologist, who reviewed decedent's medical records. Dr. Tong opined that decedent suffered a subarachnoid hemorrhage or rupture of two brain aneurysms which eventually led to his death and that working conditions as verified by family and co-workers produced considerable stress contributing to the hemorrhage. Cl. Ex. 22 at 11-13. The administrative law judge found that decedent had work-induced stress associated with unreasonable expectations for the vessel's completion and delivery based on the testimony of decedent's fellow employees and his family members. In addition, the administrative law judge found that decedent was required to work long hours and endure further stress associated with interference from Avondale superintendent, Octave Rainey. We affirm the administrative law judge's finding that the evidence is sufficient to invoke the Section 20(a) presumption as his finding that decedent's stressful working conditions contributed to the stroke is supported by substantial evidence. n3 See Marinelli v. American Stevedoring, Ltd., 34 BRBS 112 (2000), aff'd, 248 F.3d 54 (2d Cir. 2001).

In considering whether the employer presented

substantial evidence that decedent's disabling condition and death were not work-related, the administrative law judge rejected the testimony of employer's witnesses, Mr. Creighton, employer's current facilities manager, and Mr. Gaspard, employer's current maintenance manager, who denied decedent's being under considerable pressure as he found that they were not credible given the testimony of the other employees, including employer's director of purchasing, and decedent's family. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, and may draw his own inferences and conclusions from the evidence. Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5<th> Cir. 1962), cert. denied, 372 U.S. 954 (1963);Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5<th> Cir. 1962); John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2<nd> Cir. 1961). As employer identifies no error in this finding on appeal, we affirm the administrative law judge's finding that decedent's work was a "direct link and was at least an aggravating factor in the stroke he suffered" as it is rational and supported by substantial evidence. Decision and Order at 17.

Section 7

Employer also contends on appeal that the administrative law judge erred in finding it responsible for the reimbursement of decedent's medical bills to decedent's health insurer. Section 7(d) of the Act sets the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. In order to be entitled to medical expenses, claimant must first request employer's authorization pursuant to Section 7(d) of the Act, 33 U.S.C. § 907(d). See Pozos v. Army & Air Force Exchange Service, 31 BRBS 173 (1997). Under Section 7(d)(1), an employee is

entitled to recover medical benefits if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. See Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); see also Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79(CRT) (5<th> Cir.), cert. denied, 479 U.S. 826 (1986); 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

Initially, we note that in the present case, employer did not raise before the administrative law judge the issue of whether claimant sought authorization for a change in physician. See H.Tr. at 9; Emp's Post Trial Memorandum. Moreover, employer was aware of decedent's stroke and instructed claimant to seek medical coverage from another provider. See 33 U.S.C. § 907(d)(1). The case cited by employer on appeal, Parklands, Inc. v. Director, OWCP, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989), is inapposite as, in that case, the United States Court of Appeals for the District of Columbia Circuit rejected the notion of implied consent where employer was aware of the medical treatment the claimant received. However, in this case, the administrative law judge found that employer "declined to cover the medical expenses, but rather, informed Claimant to seek coverage from Intervenor." Decision and Order at 19. As employer does not raise any error in this finding, we affirm the administrative law judge's finding that it refused to authorize treatment, and thus that employer is liable for decedent's medical treatment.

In addition, contrary to employer's contention, there is no provision under the Act requiring that a private

health insurer provide ongoing medical reports to the employer. The administrative law judge found that employer had knowledge of decedent's injury, and could have investigated the reasonableness of the services provided and charges therefor. As the administrative law judge rationally found that employer refused to authorize decedent's treatment and made no inquiry into the care provided, we affirm the administrative law judge's finding that the intervenor has a right of reimbursement for the medical care and expenses which it provided decedent due to decedent's work-related injury, as it is supported by substantial evidence.

Section 28

Employer contends that the administrative law judge's attorney's fee award to claimant's counsel should be substantially reduced, and that the administrative law judge erred in awarding a fee to intervenor's counsel. Subsequent to the issuance of the administrative law judge's decision, claimant's counsel filed a fee petition requesting a fee in the amount of $26,320, representing 131 hours of legal services at the hourly rate of $200, and expenses in the amount of $9,929.45. Employer filed objections to claimant's counsel's fee petition. In addition, intervenor's counsel filed a fee petition in the amount of $24,492.50 for legal services, and expenses in the amount of $2,603.48. Employer did not file objections to this fee petition.

The administrative law judge has broad discretion in his award of an attorney's fee and the party challenging the reasonableness of an attorney's fee award bears the burden of showing that the award was contrary to law or was arbitrary and capricious, or an abuse of discretion. See generally Forlong v. American Security & Trust Co., 21 BRBS 155 (1988). It is the administrative

law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done. In awarding a fee, he must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

In the present case, the administrative law judge thoroughly reviewed employer's objections to claimant's counsel's fee petition and, after reducing one item by one hour and disallowing 1.85 hours, concluded that the hours requested were reasonable. Initially, we reject employer's contention that the administrative law judge erred in awarding claimant's counsel an hourly rate of $200, as the administrative law judge specifically considered the applicable rate in the geographic locality involved, the experience of the attorney, and the complexity of the case. See Brown v. Marine Terminals Corp., 30 BRBS 29 (1996)(en banc)(Brown and McGranery, JJ., concurring and dissenting). Employer also contends that a number of entries are excessive and should be reduced, and that the time spent driving a witness is clerical work for which counsel cannot receive a fee. The administrative law judge considered employer's contentions and found that the arguments were without merit. As employer has not raised any error with these findings, we affirm the administrative law judge's finding that these services were reasonable and necessary. In addition, we reject employer's contention that the administrative law judge erred in awarding counsel time spent preparing the fee petition, as it is well-settled that this time is compensable. See Hill v. Avondale Industries, Inc., 32 BRBS 186 (1998), aff'd sub nom. Hill v. Director, OWCP, 195 F.3d 790, 33 BRBS 184(CRT) (5<th> Cir. 1999), cert. denied, 120 U.S.

2215 (2000). We also reject employer's contention that the post-hearing meeting with claimant on January 26, 2000, should be disallowed as there was no "additional work, which need to be performed at that time to establish entitlement to compensation." Br. at 4. The administrative law judge rationally allowed this time as "wind-up" services. See Everett v. Ingalls Shipbuilding, Inc., 32 BRBS 279 (1998), aff'd on recon. en banc, 33 BRBS 38 (1999). Employer also contends that the administrative law judge erred in awarding claimant's counsel 1.75 hours over a number of days to review intervenor's pre-hearing statement and correspond with intervenor's counsel. As this time spent pertained to the award of medical benefits which indirectly involved claimant, we affirm the administrative law judge's finding that this time was necessary and reasonable. Thus, as the administrative law judge specifically considered employer's objections, and employer has raised no reversible error on appeal, we affirm the administrative law judge's award of an attorney's fee to claimant's counsel.

Employer also contends that the amounts awarded as expenses for Drs. Tong and Scrignar should be reduced. Section 28(d) of the Act, 33 U.S.C. § 928(d), provides that the costs, fees, and mileage for necessary witnesses can also be assessed against employer when an attorney's fee is awarded against employer, but only if they are reasonable and necessary. See generally Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999). The administrative law judge considered employer's contention and found that the amounts requested for Drs. Tong ($6,600) and Scrignar's ($1825) expenses were supported under the facts of this case. In addition, the administrative law judge rejected employer's contention that a number of the expenses should be disallowed as they were not used at the hearing. The test for

compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. See O'Kelley v. Dep't of the Army/NAF, 34 BRBS 39 (2000). Moreover, contrary to employer's contention the expenses requested pursuant to Section 28(d) do not have to be documented, but must be adequately explained. As the administrative law judge found that the costs were adequately itemized, and employer does not raise any error with this finding, we affirm the award. See Forlong, 21 BRBS 155.

With regard to the appeal of the intervenor's attorney's fee award, employer initially contends that the administrative law judge erred in awarding a fee for work performed prior to the date the intervenor appeared before the administrative law judge. As employer did not raise objections to intervenor's counsel's fee petition before the administrative law judge, we decline to address them now. See Pozos v. Army & Air Force Exchange Service, 31 BRBS 173 (1997); Bullock v. Ingalls Shipbuilding, Inc., 27 BRBS 90 (1993)(en banc)(Brown and McGranery, JJ., concurring and dissenting), modified on other grounds on recon. en banc, 28 BRBS 102 (1994), aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs], 46 F.2d 66 (5<th> Cir. 1995).

Accordingly, the Decision and Order of the administrative law judge awarding benefits and the Supplemental Decisions and Orders Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LOAD-DATE: August 8, 2001

Footnotes

n1 The appeals of claimant, BRB No. 00-0928, and the intervenor, BRB No. 00-0928A, were dismissed by Board Order dated August 17, 2000.

n2 Employer does not contend that the Boomtown Belle did not meet this size restriction.

n3 Employer argues that claimant failed to prove working conditions were extraordinarily stressful. However, the Fifth Circuit established long ago that work events need not be unusually strenuous to establish a compensable injury, stating,

There is no standard or normal man who alone is entitled to workmen's compensation . . . If the workmen overstrains his powers, slight though they be, or if something goes wrong within the human frame, such as the straining of a muscle or the rupture of a blood vessel, an accident arises out of the employment when the required exertion producing the injury is too great for the man undertaking the work; and the source of the force producing the injury need not be external. This was held in an English case, where on post mortem it was found that the employee had a very large aneurism of the aorta which might have burst while the man was asleep but which in fact ruptured while, with slight effort, he was tightening a nut with a spanner wrench.

Southern Stevedoring Co. v. Henderson, 175 F.2d 863, 866 (5<th> Cir. 1949)(citations omitted).

United States Code TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CHAPTER 18 - LONGSHORE AND HARBOR WORKERS' COMPENSATIONSection 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States

(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

U.S. Code as of: 01/02/01

(2)

Supreme Court, U.S.
FILED

02 1687 APR 22 2003

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

JERRY KATE BAZOR, Widow of BEN BAZOR,

Petitioner,

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

~~PETITION FOR WRIT OF CERTIORARI~~ Supplemental Appendix

Supplemental Appendix

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41 pp

CASE NO.:1999-LHC-1198
OWCP NO.: 07-135183

IN THE MATTER OF
JERRY KATE BAZOR,
Widow of BEN BAZOR
Claimant

v.

BOOMTOWN BELLE CASINO
Employer

and
LOUISIANA WORKERS' COMPENSATION CORP.
Carrier

and

GREAT WEST LIFE & ANNUITY
INSURANCE CO.,
Intervener

APPEARANCES:

Marcus J. Poulliard, Esq.
For the Claimant

David K. Johnson, Esq.
For Employer/Carrier

Elizabeth S. Wheeler, Esq.
For Intervener

BEFORE: Clement J. Kennington Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Jerry Kate Bazor, widow of Ben Bazor (Claimant) against Boomtown Belle Casino (Employer) and Louisiana Worker's Compensation Corporation (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in New Orleans, Louisiana on January 26, 2000.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-bearing briefs in support of their positions. Testifying on behalf of Claimant were Delores Bazor McNutt, Delaina Bazor Moreau, Quincy Wade Moreau and Jerry K. . Smith Moreau. Claimant introduced 23 exhibits including: Claimant's wage and tax returns for 1990 through 1994; newspaper articles concerning Employer; photographs of the dock/tent area where Claimant Worked; discovery responses; Claimant's medical records from West Jefferson Hospital; an ambulance run sheet; Claimant's death certificate and funeral expenses; Claimant's marriage license; and depositions from Robert Creighton, Reynold Gaspard, John Dicken, Russell Chatelain, Dr. C.B. Scrignar, Peter Banks, Somtop Pichakron and Dr. David C. Tong.fn1

Employer called Russell Chatelain, Robert A. Creighton, Reynold J. Gaspard and Shannon Williams Blue and introduced the following 3 exhibits: from LS-203 (Claimant's Claim for Compensation) dated November 28, 1994: Claimant's payroll, personnel and wage information with Employer and medical records of Claimant from West Jefferson Hospital. Intervenor

introduced 53 exhibits including: Employer's health and welfare plan, service agreement between Intervenor and the plan; itemized statement of expenses for Claimant, bills relating to the plan's payments to Abbey Home Healthcare; Dr. Anthony Albright, anesthesiology & Pain Management, Inc.; Apria Health Care, Dr. Raymond Baez, Dr. Thor Borresen, Dr. Francisco Candal, Care Ambulance Service, Jill Chorba, PA, Dr. Frank Culicchia, Emergency Physicians, Susan Estrada, Dr. Diana Gilimore, Dr. Gary Glynn, Dr. Christy Graves, Greenery Horizons, Dr. Thomas Irwin, Jr., Jayachandra Indru, Jefferson Radiology, JoEllen Smith Medical Center, Dr. Howard Katz, Dr. Edmund Kerut, Dr. John Kimble, Dr. John Less, Long Term Acute Care, Thomas McCaffrey, Dr. Marcello Mora, M.S. Home Infusion, Northlake Radiology, Northshore Regional Medical Center, Dr. Stephen Orville, Pearl River County Nursing Home, Priority EMS, Professional Radiology, Puckett Laboratory, Dr. Michael Reed, Rhema Medical Equipment, River Region Home Health, Jacob Sassone, Dr. Hans Schuller, Dr. Richard Schunior, Slidell Memorial Hospital, Smithkline Beecham, Dr. Paul Staab, Dr. Rian Tanenbaum, Taylor Home Health, Dr. Walter Truax, Dr. Steve Venturatos, West Jefferson Medical Center, and an affidavit from Patricia Fry.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the patties stipulated and I find:

1. Claimant was injured on July 13, 1994.

2. The injury occurred during the course and scope of Claimant's employment.

3. An employer/employee relationship existed at the time of the injury.

4. Employer was advised of the injury on July 13, 1994.

5. Employer filed a Notice of Controversion on December 13, 1994.

6. An informal conference was held on June 27, 1998.

7. Claimant's average weekly wage was $653.85.

8. Employer/Carrier paid no medical benefits. Intervenor paid medical benefits amounting to $606,306.64.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction or coverage under the Act.

2. Causation of injury.

3. Nature and extent of injury.

4. Payment of medical bills by Employer.

5. Intervener's right to recover medical benefits

paid on behalf of Claimant.

6. Penalties, interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Many of the facts concerning Claimant's work history and employment with Employer were uncontested. The records show Claimant, who was born on June 2, 1940, to have a high school education followed by 4 years of service in the U.S. Navy. On September 27,1962 he married Jerry Kate Smith and had two children, Delores Bazor McNutt and Delaina Bazor Moreau. (Tr. 28, 41,42 54-56).

Prior to his employment with Employer, Claimant had an extensive background in refrigeration and appliance repair with state refrigeration and gas fitter licenses. From 1962 to 1969, Claimant worked as a service supervisor for Sears and Roebuck, supervising 45 employees in refrigeration and appliance repair. This was followed by similar work at Montgomery Ward from 1970 to 1971, after which he was employed by Taylor Diving and Salvage from 1971 to 1980 as a refrigeration shop foreman supervising 10 employees in air conditioning and heating system maintenance along with the fabrication and maintenance of environmental control systems for diving chambers. From 1980 to 1989 he operated his own air condition and appliance business followed by employment with Pool Offshore Company from 1989 to 1992, where he worked as an electrician, air conditioning and heating repair person servicing appliances, gas detection, alarm, P.A. systems on offshore drilling rigs. From September 1992 to June 1994, he worked for Casino Magic in Bay St. Louis,

Mississippi, as a shift maintenance supervisor. (CX-8, pp. 44, 45; Tr., 56-58).

On June 9, 1994, Employer hired Claimant as a facilities manager on the recommendation of Russell Chatelain, Director of Purchasing, who in turn reported to General Manager, Jay Rabalais. (CX-18, pp.7-9; Tr., 59). fn2 Supervisors and employees regarded Claimant as extremely conscientious fair and honest in his dealings with others. (Tr. 59, 50). Claimant was responsible for starting up and hiring the maintenance and housekeeping departments and getting Employer's facilities ready for business. (Tr. 109). When Claimant was hired the facilities included a boat which was under construction at Avondale's Westwego shipbuilding yard; a parking lot and large tent located about 50 feet from the Harvey Canal off; an adjacent dock and office building under construction; a warehouse and office at 3008 Engineers Road with additional office space in an adjacent red brick building and another warehouse in Terrytown.fn3 (Tr. 112, 113; CX-18,. p. 22; CX-20, p. 48). The tent served as a temporary shelter to house casino patrons as they were waiting to board the casino vessel with bathrooms and a employee cafeteria. It was replaced in December, 1994, by a permanent office building built by Grimaldi, an independent contractor. (Tr. 146, 147).

As facilities manager, Claimant hired housekeeping manager Robert Allen Creighton on June 21, 1994. Creighton in turn was responsible for all housekeeping and janitorial services for Employer which included routine housekeeping assignment such as cleaning, mopping and dusting on the vessel as well as the offices and warehouses. (Tr. 117-119, 134, 135). Creighton interviewed and Claimant hired housekeeping personnel. Claimant was also responsible for ordering

housekeeping supplies. (Tr. 131, 132, 142, 143). Creighton currently holds tine position of facilities director, a position to which he was appointed in late 1995. (Tr. 135).

Claimant was also responsible for hiring maintenance personnel and ordering supplies for that department. In. June, 1994, Claimant hired the following maintenance personnel: Peter J. Banks (Maintenance Supervisor), Reynold Joseph Gaspard, Somtop "Tip" Pichakron, Reynolds, Gill Thompson, and Jim Mantie. (Tr. 160, CX-20), pp. 18-20; CX-21, p. 6). Besides hiring and staffing the maintenance department, Claimant was also responsible for cleaning up and repairing the Casino vessel prior to delivery. (Tr. 125). In addition, he was also responsible for the installation and wiring of slot machines prior to delivery, because Avondale was behind schedule in the ship construction, which Employer found to be of poor quality. The casino vessel was originally scheduled for delivery and operation on July 4, 1994. However, the casino had to delay opening until August 6, 1994. (CX-2; Tr. 126-128).

Indeed, it was because of poor workmanship and delays in construction that forced Claimant to use his housekeeping staff to clean the vessel, while Claimant employed his maintenance staff to work considerable hours of overtime installing and wiring slot machines. (Tr. 114). Claimant worked up to 15 hours per day, from July 5 to his stroke, while supervising a maintenance crew that put in 10 to 12 hour days making sure that the Casino vessel was properly outfitted with properly wired slot machines. (Tr. 168, 169, 176) (CX-20, pp. 21-23). Creighton even had to put in 50 to 60 hour weeks from June21 to July 13, 1994 working 6 days a week. (Tr. 137, 138).

Avondale's poor performance caused Employer considerable concern and stress, because every day the opening was delayed Employer lost considerable revenue. (Tr. 126-129). During the afternoon of July 13, 1994, between 3 p.m. and 6 p.m., Claimant, while sitting in a chair in the tent collapsed and fell to the ground unconscious. Employer had Claimant taken by ambulance to West Jefferson Hospital, where he was treated and diagnosed with a aneurismal subarachnoid hemorrhage secondary to a MCA aneurysm. On the same date, Claimant underwent a right frontal temporal craniotomy, clipping of middle cerebral bifurcation aneurysm, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. (CX-11,12).

Claimant remained at West Jefferson Hospital until October 1994, when he was transferred to Greenery Neurological Center in Slidell where he remained until March 1995. He was readmitted to Slidell Memorial Hospital on March 5,1995 and was discharged on March 31,1995. He remained at his daughter's home in Marrero from March 31, 1995 to October 5, 1995 where he received 24 hour care from nurse and family members undergoing 80 hyperbaric treatments. When family members could no longer provide the necessary care, Claimant was transferred on October 5, 1995 he was transferred to Pearl River County Hospital and Nursing Home where he remained until his death on October 2, 1997. (CX-10). From the moment of his stroke and initial collapse until his death Claimant never regained consciousness. (CX-3 , CX-19, pp.76). Claimant's death certificate listed the immediate cause of death as cardiorespiratory failure due to pneumonia. (CX-13).fn4

Claimant's medical bills were paid for by Intervenor pursuant to a health and welfare policy which Claimant applied for and accepted when hired. A summary of the plan and service agreement were listed

as EX-1 and 2 were attached to IX-53. A detailed list of the medicals paid Claimant amounting to $606,306.64 were provided. Claimant's funeral bills consisted on a monument bill of $1,840.00 and burial expenses of $55,552,50. (CX-14).

B. Testimony of Jerry Kate Bazor (Claimant's Widow);

Jerry Kate Bazor's, (Ms. Bazor) testimony dealt primarily with Claimant's character, work history and job responsibilities with Employer and the pressures and stress caused by his employment with Employer.fn5 Ms. Bazor described her marriage to Claimant resulting in two daughters, (Delores Bazor McNutt and Delaina Bazor Moreau) and 5 grandchildren and detailed his work history prior to Employer as noted above. (Tr. 54-59). She described her husband as a good family man, honest, a perfectionist about work, fair treatment of fellow workers and a person with an easy going personality not prone to complain. (Tr. 59-61).

Ms. Bazor testified that Claimant was hired to be in charge of all land based and marine vessel repairs and maintenance including housekeeping and ground facilities. (Tr. 62-67, 72-75), The maintenance duties included repair of air conditioning and heating equipment, ice and bar machines, stoves, refrigerators, freezers, electrical, plumbing, and sewer work as well as changing table tops for gaining tables on the casino vessel. (Tr. 68-72). Ms. Bazor testified about Claimant's work at Avondale, where he supervised installation and wiring of slot machines and purchase of related supplies.

Ms. Bazor described at length the problems Claimant faced in being unable to hire enough qualified

employees because of low pay scales and the difficulties in getting supplies on time requiring in some case 2 to 3 days for delivery. In addition, she testified about job pressures: (1) to cut corners which he refused to do; (2) to meet time schedules, causing him to utilize maintenance and housekeeping personnel to do Avondale work of cleaning the casino vessel, install and wire slot machines. (Tr. 75-79). Claimant became so obsessed with the job that he stopped eating, lost weight and worked excessive 12 hour days, 7 days per week prior to his stroke frequently going back to the jobsite late at night to check on work. (Tr. 80-84).

Ms. Bazor described an argument her husband had with Avondale superintendent, Octave Rainey, just prior to his stoke, in which Claimant defended his men's work and the wire they had used in the slot machine hook up and told Rainey not to "jump his people." Reynold Gaspard told Ms. Bazor about the argument while he (Gaspard) was in the West Jefferson ICU immediately following Claimant's stroke. According to Ms. Bazor, Gaspard described the argument as quite heated. She also described other arguments that Claimant had with Avondale personnel, involving the wearing of steel toe shoes resulting in the temporary removal of

Employer personnel from the casino vessel. (Tr. 85-87, 186).fn6

C. Testimony of Delores Bazor McNutt, Delaina Bazor Moreau, and Quincy Wade Moreau:

Daughter, Delores Bazor McNutt, (McNutt), testified this prior to her father's stroke he had been working long hours which prevented her from seeing him except for a few hours apparently on July 3 and then on July 4, 1994. During the week of July 4, 1994, Claimant did not stay at

his home, but rather lived with his daughter, Delaina Bazor Moreau, (Moreau), because of her close proximity to the jobsite. McNutt confirmed her father's dedication to family and perfectionist work tendencies and the stress it caused because of his inability to get qualified employees. She was also present when Gaspard relayed the argument between Octave Rainey and her father. (Tr. 28-3 9).

Moreau testified that her father stayed with her two nights a week, when initially hired, but following the July 4 holiday began staying there every night so that he worked longer hours. According to Moreau, her father would leave for work at 6:00 a.m. and return at 6:30p.m., only to go back to work again to check on night crew work. Moreau testified that her father was preoccupied with running behind schedule and complained about headaches, but refused to seek medical attention, (Tr. 41-47).fn7

Quincy Wade Moreau, (Quincy Moreau), Claimant's son in law, testified about Claimant's devotion to family and work and confirmed Claimant's long work hours leaving home at 6 a.m. and returning at 7p.m., only to leave again at 8 p.m. and return at 11 p.m. Quincy Moreau testified that Claimant was concerned about not being able to meet job deadlines because Avondale was behind schedule. (Tr. 49-52).

B. Testimony of Peter J. Banks:

Maintenance supervisor, Peter J. Banks, (Banks), who was, hired by Bazor in June 1994 and later replaced Claimant when he suffered a stroke on July 13,1994, provided first hand knowledge about Claimant's job

responsibilities and the pressures he endured during the initial start up of operations. (CX-15, p. 40).fn8 a maintenance supervisor, Banks testified that be was initially hired to perform all facility maintenance including buildings, tent, warehouses and offices, grounds and casino vessel. This included routine maintenance such as changing light bulbs, replacing door knobs and making sure the air conditioning was functioning properly. Claimant was required to get 3 separate bids or prices on maintenance supplies before being allowed to purchase such supplies. (CX-20, pp. 7-14, 47-49).

Concerning the casino vessel, Banks was responsible with Claimant for running wire and setting up slot machines, and making sure the air conditioning was running properly on the casino vessel. Claimant had a check list of maintenance items that he and Banks would go over daily and resolve to make sure he casino vessel would function properly. Claimant and Banks were responsible for supervising a maintenance crew of Somtop "Tip" Pichakron, Reynold Gaspard, Gill Thompson, Jim Mantie, who worked on the casino vessel installing and wiring up slot machines. (CX-18-2O).

Claimant and Banks were initially responsible for all casino vessel maintenance which required both men to spend considerable time learning vessel schematics. The only vessel maintenance not initially assigned to Claimant and Banks the steering, navigation and power trains. Both Claimant and Banks were responsible for vessel plumbing, electrical, refrigeration and lighting. About 5 to 6 days after Claimant's stroke, Employer brought in an outside contractor and maritime crew. (West Bank River Boat Services), to perform vessel maintenance except for replacing gaming tables carpets

and oils, painting, wallpapering which Employer left to its maintenance staff. (CX-.20,pp,8, 59-62, 69, 73-74; Tr. 111).

Banks confirmed Ms. Bazor testimony about disputes between Claimant and Octave Rainey. Banks testified that Claimant had frequent arguments with Rainey concerning the method of pulling wire and the supposed need to work Claimant's crew up to 15 hours per day, which Claimant refused. (CX-20, pp.21-23, 68, 69). Banks also confirmed the pressures Employer, (Russell Chatelain), placed on Claimant by: (1) making him secure multiple bids and purchase orders which delayed receipt of necessary supplies, (CX-20, pp. 24-27; (2) not allowing Claimant to purchase the right tools and equipment, (CX-20, pp. 43-46, 63); (3) not allowing Claimant the ability to hire enough qualified personnel, (CX-20, 30-33, 64,65; and (4) imposing additional assignments such as forming and running a transportation department (CX-20, pp. 28, 29).

Banks described Claimant as a man under considerable stress to accomplish all assign tasks on a timely basis, who often complained of headaches and worked considerable hours. (CX-20. pp. 36,38, 67). In addition to these pressures, Claimant and Banks ran into frequent air conditioning problems, especially in the tent which was hard to cool, plus maintenance problems on the bulkhead and casino vessel gangplank which had to be rebuilt. (CX-20, pp. 51-58).

E. Testimony of Somtop (Tip) Pichakron

Somtop "Tip" Pichakron, (Tip), testified that he was hired in either June or May 1994 as a maintenance engineer for the air conditioning system on both the casino vessel and the land facilities. (CX-21, pp 6-8). His

initial assignment involved the casino vessel stationed in Avondale's Westwcgo shipyards where he was assigned to run data lines from the shot machines to the vessel computers. Tip described problems with Octave Rainey, trying to give him orders and the pressure Claimant was placed under prior to his stroke to complete work on schedule. It was because of such pressure that Tip declined Claimant's job when offered it following Claimant's stroke. Tip also confirmed the fact that he and other maintenance crew personnel were working 10 to 12 hour days, 6 to 7 days a week prior to Claimant's stroke. (CX-21, pp 9-32).

F. Testimony of Russell Chatelain

Russell Chatelain's, Employer's director of purchasing since October 15, 1994, testimony dealt with casino operations and Claimant's duties. (Tr. 108). According to Chatelain, Claimant was hired to be Employer's eventual facilities director. Claimant was responsible for starting up the maintenance and housekeeping department, hiring the necessary personnel to commence commercial operations. (Tr. 109). When Claimant was hired the dock and main office building were under construction as was the boat or casino vessel. Vessel maintenance operations were eventually assigned to an outside contractor, West Bank River Boat Services, (Tr. 111). Prior to completion of the dock and office building by independent contractor, Grimaldi, in December, 1994, Employer used a tent located in a parking lot area about 50 feet from where the boat eventually docked to hold casino patrons prior to vessel loading and discharge. (Tr. 112,113).

Chatelain admitted that it was not unusual for department heads to make requisitions for supplies which were in turn denied because of lack of funds. (Tr.

110, 111, 115, 116). Chatelain confirmed Claimant's maintenance and housekeeping responsibilities as well as his work on the casino vessel prior to delivery. (Tr. 117-125) Chatelain also admitted that Avondale was responsible for poor workmanship and late delivery of the casino vessel resulting in substantial loss of revenues, which in turn created a pressure filled and stressful atmosphere. (Tr. 126-129).

Chatelain described the operations and supervisory structure as previously noted as well as the stroke incident wherein security guard, John Dicken, reported Claimant's collapse followed by Employer's head of security, Jack Lott calling for an ambulance which took Claimant to West Jefferson Hospital. (CX- 18 , CX17)fn9

G. Testimony of Robert Allen Creighton:

Robert Allen Creighton, (Creighton), who was hired by Claimant as housekeeping manager on June 20, 1994, and eventually in late 1995 became facilities director, testified about his duties which included housekeeping duties both on land shore and marine facilities including the casino vessel. Creighton described his role with Claimant in removing trash from the vessel while under construction at Avondale's Shipyard and Claimant's work in running wire for vessel computers and slot machines confirming the fact that Claimant prior to his stroke worked up to 60 hours per week. (Tr. 131, 134-137).

Creighton confirmed Claimant's job of hiring personnel and the fact that Avondale was behind on boat construction which required Employer to help install wires and clean the vessel prior to delivery. However, Creighton, unlike Chatelain and Banks, denied the existence of job stress associated with construction

delays or the lack of materials or equipment. (Tr. 133, 138, 139, 155). Creighton did confirm however, Claimant's complaints about headaches and his maintenance department's duties on the vessel limited to minor repairs such as changing table tops, and carpeting with all major repairs being performed by West Bank River Boat Services. (Tr. 135, 154; CX-15, pp. 24, 25).fn10

H. Testimony of Reynold Joseph Gaspard:

Reynold Joseph Gaspard, who was hired as a maintenance man by Claimant in June 1994 and currently is Employer's Maintenance Manager, testified that he was initially assigned to run wire on the casino vessel while it was still under construction at Avondale's Shipyard. (Tr. 160-164). Gaspard admitted that material did not arrive on time, but contended it did not affect his work and that he was under no pressure to get the job done on time. (Tr. 165, 167). However, Gaspard did admit working up to 12 hours per day with 4 other employees prior to Claimant's stroke, and the fact that Claimant complained of headaches while working long hours. (Tr. 168, 176, 177).

When questioned about Claimant's arguments with Octave Rainey, Gaspard admitted that Rainey openly doubted the work capabilities of Claimant and his crew, but denied witnessing any argument between Claimant and Rainey and could not remember telling Ms. Bazor about arguments between Rainey and Claimant. (Tr. 171-179).

I. Shannon Williams Blue:

Shannon Williams Blue, (Blue), a senior claims

representative for Carrier testified that she was the claims representative responsible for handling Claimant's file and that she never received copies of medical bills or medical reports concerning Claimant's stroke and subsequent treatment. Blue testified that she requested, but never received such information from Claimant's counsel, Lloyd Frischhertz. (Tr. 181, 182).

On cross Blue admitted however, that she understood that when Ms. Bazor filed this claim for compensation on November 2~8, 1994, Claimant had sustained a cerebral vascular accident, (CVA), which left him comatose and in need of hospitalization. (Tr. 182, 183). The claim, EX-2, noted not only the nature of the injury, (cerebral vascular accident), but the cause, (pressure in getting casino vessel ready for operation) and subsequent treatment at West Jefferson Hospital and Greenery Neurological Rehabilitation Center in Slidell.fn11

Blue further admitted not reviewing her file before testifying and being unable to recall the date she requested medical information from Frischhertz , and also being unable to recall any details from an informal conference, wherein she allegedly requested medical records from Claimant's trial counsel, Marcus Pilewort. (Tr. 184, 185).

J. Medical Testimony of Dr. C.B. Scrignar:

Dr. Chester Bruno Scrignar, (Scrignar), a psychiatrist and professor in clinical psychiatry at Tulane University school of Medicine testified as an expert in trauma, stroke and stress cases and clearly identified stress as a causative factor in cardiovascular disease, hypertension, and strokes injuries. Dr. Scrignar testified that stress caused elevated heart rates, blood pressure, headaches

and weigh loss and forms the genesis of cerebral vascular accident. (CX-19, pp. 21,22, 30-35).

Dr. Scrignar performed a psychological autopsy of Claimant to determine the psychiatric and psychological factors contributing to his death by reviewing the medical records and gathering information from Claimant's family and coworkers. Dr. Scrignar found Claimant to be a very conscientious, well liked and loved person who put pressure on himself and was subjected to job stressors associated with his work with Employer including long hours of work time constraints, inability to delegate responsibilities, limited resource, (Tr. 23- 28). Dr. Scrignar described Claimant as having a Type A personality, i.e., person who puts stress on self, and a person who suffered from chronic, unrelenting work stress that contributed to his aneurysm. (CX-19, 53, 59, 60, 65, 70). The stress was manifest by anorexia and muscle tension headaches. (CX-19 pp. 46-50).

Dr. Scrignar testified that Claimant was subjected to excessive responsibilities at work without the necessary help which combined with a natural conscientiousness which eventually led to or contributed to his stroke. (CX-19, pp. 64,65).

K. Medical Testimony of Dr. David Tong:

Dr. David Tong, an assistant professor of neurology at Stanford Medical Center, testified that stress could cause a stroke, i.e., persistent of acute stress could cause elevated blood pressure which in turn could cause an aneurysm to burst (CX-22, pp. 7-11). Dr. Tong after reviewing Claimant's medical records, testified that Claimant suffered a subarachnoid hemorrhage or rupture of two brain aneurysms which eventually led to his death and that working conditions as verified by

family and coworkers produced considerable stress contributing to the hemorrhage. (CX-22, pp. 11-13). Dr. Tong further testified that a one time event was not likely to lead to a stroke, but stress of short or long duration contributed to it, and that hypertension doubled or tripled Claimant's likelihood of a stroke which was further doubled by Claimant's smoking. (CX-22, pp. 18-21).

IV. DISCUSSION

A. Contention of the Parties:

Concerning jurisdiction or coverage, Claimant's Counsel contends that Claimant's work satisfied both the situs and status requires of Section 903 of the Act and in support thereof sites the following cases: (Situs) Texports Stevedore Co. v. Winchester, 63 F.2d 504 (5th Cir. 1980); Jacksonville Shipyards, Inc. v. Perdue 539 F.2d 433 (4th Cir. 1970); Odem Construction Co. Inc., v. United States Department of Labor 622 F.2d 110, 113 (5th Cir. 1980); Cooper v. Offshore Pipelines International, Inc., 33 BRBS 46(1999); (Status)P.C. Pfeiffer Co. v. Ford. 444 U.S. 69 at 77(1979); Northeast Marine Terminal Co., v. Caputo, 432 U.S. 249 (1977); Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980); Sanders v. Alabama Dry Dock and Shipbuilding Co., 841 F.2d 1085 (11th Cir. 1988); Hullinghorst Industries Inc., v. Carrol, 650 F.2d 750 (5th Cir. 1981); McKay v. Bay City Marine Inc., 23 BRBS 332 (1990). Counsel argues that Claimant clearly worked in an adjoining an customarily used by Employer in the loading, unloading, repair and building of its casino vessel, i.e., a tent area 50 feet from the vessel gang plank, Avondale's Westwego Shipbuilding facility. Further, Claimant's regular duties involved the repair and maintenance of the casino vessel and the fact that

he was injured while either standing or sitting inside a tent should not detract from his overall maritime employment status, for employee can be based either upon the nature of the activity at time of injury or upon the maritime nature of Claimant's employment as a whole. Hullinghorst Industries, supra, at 754.

Employer's counsel argues that Claimant lacks the necessary: (1) situs since the injury did not occur over navigable waters, but rather in a tent over one hundred feet from the Harvey Canal with no connection to maritime commerce; and, (2) status since casino employees are employees of a recreational facility and exempt from coverage under Section 902(3)(B) of the Act lacking a substantial nexus to maritime commerce. Arnest v. Mississippi River Boat Ltd. ,29 BRBS 423 (ALJ) 1995 and Peters v. Roy Anderson Building Corp., 29 BRBS 437 (ALJ) (1995). Counsel contends that 's work on the Casino vessel was done solely in furtherance of the gambling enterprise and had nothing to do with the construction or operation of the vessel and was merely "gratuitous performance" of work "to expedite delivery of the vessel."

Concerning causation Claimant's counsel argues that Section 920(a) creates a presumption that Claimant's disabling condition was casually related to his employment and that in order to invoke the presumption, Claimant must prove that he suffered a harm and that conditions existed at work which could have caused, aggravated or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., BRBS 140 (199 1); Stevens v. Tacoma Boat Building Co., 23 BRBS 191(1990). Counsel contends that there is no question that Claimant suffered an injury while at work and that Employer offered no evidence to rebut the presumption as required by James v. Pate Stevedoring Co., 22 BRBS

271 (1989). Further, Employer failed to rebut the testimony of Drs. Tong and Scrignar directly linking work related stress to Claimants stroke thereby convincingly establishing causation.

Employer's counsel invokes Director, QWCP v. Greenwich Collieries, 114 S. Ct. 2252 (1994) arguing that factual doubts, when evenly balanced by evidence, cannot be decided in Claimant's favor and that Claimant failed to prove the second factor of Kelaita v. Triple A Machine Shop. 13 BRBS 326 (1981), i. e., that conditions existed at work which could have caused Claimant's stroke. Phillips v. Union Texas Petroleum, 27 BRBS 625 (ALJ) (1994); Oargeron v. Mack Greves, Inc., 30 BRBS 423 (ALT)(1996): Dvale v. Department of the Army, 30 BEDS 52a (AU) (1996).

Concerning the payment of medical costs, Claimant's counsel contends that Employer is responsible for Claimant's extensive medical costs and funeral expenses which are the natural and unavoidable result of his work injury, and that Employer has a continuing obligation to pay an injured employee's medical expenses. 33 U.S.C. § 907; Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979); Strachan Shipping Co., v. Hollis, 460 F.2d 1108 (5th Cir. 1972). Further, Employer was aware of Claimant's injury on July 13, 1994 and received a claim for compensation filed on November 28, 1994, followed by a notice of controversion filed on December 13, 1994. Section 907(d) is not applicable, since Intervenor and not Claimant, is seeking reimbursement for medical expenses. Claimant 6led a claim for benefits on November 28, 1994, which Employer rejected. Claimant's initial treatment was emergency treatment for which there was no time to first obtain Employer's authorization. Employer had an obligation to investigate

Claimant's treatment knowing that it might be liable far such and is imputed with knowledge of his treatment. See Harris v. Sun Shipbuilding & Dry Dock, Co., 6 BRBS 4 94 (1977); rev'd on other grounds sub nom; Aetna Life Insurance Co., v. Harris, 578 F. 2d 52 (3rd Cir. 1978). Further, Intervenor has no right to reimbursement from the first monies Claimant may receive as compensation since medical expense awards are independent from money received by Claimant under Section 8 or 9 of the Act. Intervenor may recover for medical cost only from Employer. See Union Stevedoring Corp v. Norton, 98 F.2d 1012(3rd Cir. 1938).

Employer's counsel argues that intervention was untimely since it was not filed until November, 1999, with Intervenor providing no medical bills until time of trial to either Claimant or carrier, in violation of 33 U.S.C. 907 and 20 C.F.R. § 702.421 which requires carrier to be provided with ongoing medical reports, thus preventing carrier from determining the necessity, character or sufficiency of the treatment furnished to Claimant or the opportunity to contest the reasonableness of the charges, i. e., whether the charges exceeded the prevailing charges within the community for the same or similar services.

Intervener's counsel states that Intervenor paid Claimant's medical bills although its plan expressly exclude coverage for work related accidents after it learned that Carrier denied liability for Claimant's on the job injury. Intervenor asserts that it intervened to protect its subrogation right against Carrier as provided for in its health plan, and further it is entitled to a first lien on any recovery by Claimant including compensation payments. Aetna Life Ins. Co., v. Harris, 578 F.2d 52 3rd Cir. 1978); E.P. Paul Co., v. Director, OWCP, 999 F.2d 1341, 1351(9th Cir. 1993); Mijangos v.

Avondale Shipyards. 19 BRBS 15(1986); Janusviewiez v. Son Shipbuilding & Dry Dock Co., 677 F.2d 286, 292 (3rd Cir. 1982); Sunbeam-Oster Co., Benefit Plan v. Whitehurst, 102 F.3d 1368 (5th Cir. 1996); Walker v. Wal-Mart Stores, Inc. 159 F.3d 938, 940 (5th Cir. 1998); Barnes v. Independent Automobile Dealers Ass'n of California Health & Welfare Benefit Plan v. Whitehurst 64 F.3d 1389, 1394 (9th Cir. 1995); Health Cost Controls, Inc. v. Isbell. 139F.3d 1070 (6th Cir. 1997);Ryan v. Federal Express Corp., 78 F.3d 123 (3rd Cir. 1996); United McGill v. Stinnett 154 F.3d 168, 173 (4th Cir. 1998); Blue Cross & Blue Shield of Alabama v. Sanders. 138 F. 3d 1347, 1355 (11th Cir. 1998); Zeller v. UNUM Life Insurance Company. 1997 WL 732420 (E.D. La. 1997) aff'd, 161 F.3d 8(5th Cir. 1998).

Counsel for Intervenor also asserts that Section 907(d) of the Act does not bar its right to recover its lien because Employer had ample notice of claimant's injury and even advised Ms. Bazor to pursue health coverage benefits with Intervenor. Base Billeting Fund Laughlin Air Force Base v. Hernandez, 588 F.2d 173, 177-178 (5th Cir. 1979Roger's Terminal & Shipping Corp., v. Office of Worker's Comp., 784 F.2d 687, 694 (5th Cir. 1986); cert. denied, 107 S. Ct. 101(1986); Nardella v. Campbell Machine 525 F.2d 46, 50-51(9th Cir. 1975). Further, Employer/Carrier failed to show that any treatment received was unnecessary or unrelated to Claimant's work injury, or that it had been harmed by strict compliance with Section 907 (d) and further, that I have the discretion in the interest of justice to excuse a failure of claimant's treating physician to file reports within the 10 day period specified in Section 907(d). Eikel Norris. 101 F. Supp. 963 (D.C. Tex. 1951), aff'd. 200 F.2d 724, reversed on other grounds, 346 U.S. 328; Shahady. Atlas Tile & Marble Co., 682 F.2d 968, 970 (D.C. Cir. 1982), cert. denied. 103 S. Ct. 786 (1983);

Plappert v. Marine Corps Exchange, 31 BRBS 13(1997): Buckaults v. Shippers Stevedore Co., 2 BRBS 277, 280(1975).

B. Credibility of Witnesses:

It is well-settled that in arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459. 467, reh. denied, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741(5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co., v, Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333(1953); J.B. Vozzolo, Inc. v. Britton. 377 F.2d 144 (D.C. Cir. 1967), The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof. Director OWCP v. Greenwich Collieries. 512 U.S. 267, 114 S. Ct, 2251(1994), aff'g 990 F.2.d 730(3rd Cir. 1993).

In this case, I was impressed with the testimony of Banks, who was the maintenance supervisor under Claimant and later replaced him as facilities director and Chatelain, director of purchasing, as well as family members (Ms. Bazor, Delores Bazor McNutt, Delaina Bazor Moreau and Quincy Wade Moreau), fellow

employee Somtop "Tip" Pichakron and Drs. Scrignar and Tong. On the other hand, I was not impressed with Blue who was a totally unprepared witness, nor was I impressed with Gaspard who denied job pressures that were admittedly present and was unable to recall arguments between Rainey and Claimant which were verified by Banks, and to some extent verified by Gaspard's admission of Rainey's open criticism of Claimant and his staff's competence.

C. Jurisdiction or Coverage Under the Act:

Following the 1972 Amendments to the Act, an injured party seeking coverage must satisfy both a status and a situs test. See Northeast Marine Terminal Co., supra 432 U.S. 249, 264-65, 97 S. Ct. 2348, 2357(1977); Herb's Welding. Inc. v. Gray, 470 U.S. 416, 105 S. Ct. 1421, 1423(1985). The status requirement for coverage under the Act is established in 33 U.S.C. § 902(3):

The term "employee" means any person engaged in maritime employment, including a longshoreman or other person engaged in longshoring activities, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . .

The Supreme Court stated that a claimant satisfies the status for coverage if he spends "at least some of his time engaged in indisputably covered activities" Caputo, supra. This language was strictly interpreted by the Fifth Circuit in Boudloche v. Howard Trucking. Co., Inc., 632 F.2d 1346(5th Cir. 1980), where that court specifically rejected the "substantial portion" requirement in holding that 2½ to 5 percent of the claimant's time spent loading and unloading was satisfactory. Id at 1347. Recently, in McGoev v. Chiquita Brands International 30 BRBS 237(1997), the Board held that the Administrative Law

Judge's finding that claimant spent 3 to 5 percent of his time in a covered activity alone was enough to invoke coverage under Caputo and Baudloche, citing Ferguson v. Southern States Cooperative, 27 BRBS 16(1993).

Even more recently, in Lewis v. Sunnen's Crane Service. Inc,. 31 BRBS 34 (1997), the Board stated that the determination of whether an employee spends "some of his time in covered work" is not dependent on mathematical percentages. Rather, the key factor is the nature of the work to which the claimant could be assigned. Id. at 40. The Board went on to recognize that while at some point work is so episodic or momentary that the claimant will not be covered, that point is yet to be defined. Id. The First Circuit has defined episodic" to be those activities which are "discretionary or extraordinary", as opposed to those which are "a regular portion of the overall tasks to which [claimant] could be assigned". Levins v. Benefits Review Board, 724 F.2d 4, 8, 16 BRBS 23, 33 (CRT) (1st Cir. 1984). It was this definition which was relied upon by the Board in both McGoev and Lewis. Further, activities cannot be said to be "discretionary or extraordinary" merely because they occur infrequently. McGoey, 30 BRBS at 239, see also Lennon t Waterfront Transport. 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir 1994). It is not the overall frequency with which Claimant performed the activity which is controlling. See McGoey, 30 BRBS at 239 Rather, it is whether the covered activity is one which is regularly performed as a portion of the overall tasks which Claimant is assigned which makes the ultimate determination. See Boudloche, 632 F.2d at 1348; McGoey, 30 BRBS at 239, citing Levins, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984).

In this case Claimant's status can be judged either by the nature of the activity at the time of injury or upon his

employment as a whole. Hullinghorst Industries, supra, at 754. Since the record does not reveal the nature of his activity in the rent at time of injury, I must look to his overall employment. On that issue, the record is clear that prior to his injury, he spent a substantial portion of his time in the outfitting and cleaning the casino vessel. In addition his duties clearly included all maintenance on the vessel with the exception of the steering, navigation and power train systems. Thus, Claimant had to spend considerable time learning about the vessels design in order to be able to do necessary refrigeration, plumbing, electrical and lighting work. Besides the vessel which was clearly required to sail and pass Coast Guard certification, Claimant was responsible for maintenance and repair of the tent and dock area and in fact had supervised the reconstruction of the vessel ramp.

Although Bank's duties were later changed to include only replacement of gaming tables, carpets, and stalls, painting and wallpapering following Claimant's stoke, it is the nature of Claimant's duties while working which determines his status.

I find no merit to Employer's argument that Claimant's duties were solely limited to furtherance of the gambling enterprise consisting merely "gratuitous performance" of work "to expedite delivery of the vessel" and thus lacked a substantial nexus to maritime commerce. Rather, I find that Claimant's work was essentially linked to vessel construction or outfitting which included installation and wiring of gambling equipment and vessel cleaning prior to delivery with subsequent maintenance and repair following delivery and hence had a substantial connection to maritime commerce. In addition, Claimant was responsible for dock and adjoining building and tent maintenance which

permitted the loading and unloading of passengers from the vessel. Thus Claimant met the status requirement of Section 902(3).

The situs requirement for coverage under the Act is set forth at 33 U.S,C, § 903(a);

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel),

The Board has recently upheld a finding that an employer's entire facility was a maritime situs for the purposes of the Act, as it was adjacent to the Houston shipping channel and was customarily used for loading and loading and unloading. Gavronovic v. Mobile Mining & Minerals, 33 BRBS 1, 4 (1999). In this ease, there is no question that the tent and dock area where Claimant worked with the air conditioning system and had his stroke was within 100 feet of the Harvey Canal and constituted the only area where passengers could get on or leave the casino vessel. Thus, under applicable precedent, this area met the situs requirements of the Act. Texports Stevedore Co., supra; Jacksonville Shipyards, supra; Odem Construction Co., supra.

D. Prima Facie Case, Section 20(a) presumption and Causation.

To establish a prima facie case for invocation of the Section 20(a) presumption, a claimant must prove that: (1) he suffered a harm, and (2) an accident occurred or

working conditions existed which could have caused the harm. See e. g., Noble Drilling Company v. Drake. 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556(1979), aff'd sub nom. Gardner v. Director. OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. See e.g., Loone v. Sealand Terminal Corp., 19 BRBS 100(1986).

Once a claimant has carried his burden of establishing the existence of a prima facie case, he is entitled to rely on the presumption supplied by Section 20(a) of the Act. This presumption functions to link the harm suffered by Claimant to his employment. Noble Drilling v. Drake. 795 F.2d 478 (5th Cir. 1986): Hampton v. Bethlehem Steel Corp., 24 BRBS 141(1990); Kelaita, 13 BRBS 326(1981). The Section 20(a) presumption shifts the burden to employer to come forward with substantial countervailing evidence that the injury or harm was not caused by claimant's employment. Brown v. Pacific Dry Dock 22 BRBS 284(1989). Brennen v. Bethlehem Steel, 7 BRBS 947(1978). Thus, once the presumption applies, the relevant inquiry is whether employer has succeeded in establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324(1981). When there has been a work-related accident followed by an inquiry, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove

another agency of causation to rebut the presumption of Section 20(a) of the Act. Stevens v. Todd Pacific Shipyards Corp., 14 BRBS 626(1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984). If employer fails in this attempt, claimant may properly rely on the Section 20(a) presumption to link his injury with his employment. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers 296 U.S. 280, 56 S. Ct. 190 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 297(2nd Cir. 1932).

In this case, I find that Claimant clearly showed that he suffered an injury (stroke) while at work and that this injury was directly related to work induced stress associated with unreasonable expectations for boat completion and delivery considering Avondale's poor workmanship and construction delay combined with Claimant's inability to hire sufficient personnel and supplies due to budgetary restraining. Claimant was forced to work long hours and endure further stress associated with interference from Avondale superintendent, Octave Rainey. The unquestioned and credible medical evidence showed that Claimant was subjected to chronic work which lead to high blood pressure arid eventually the stoics which he suffered on July 13, 1994.

Employer offered no credible evidence to rebut these facts. To the extent that Creighton or Gaspard denied being under considerable pressure, I discredit such testimony especially in light of Chatelain's admission that Avondale delays and poor workmanship created a stressful atmosphere causing Employer to delay its opening and suffer substantial revenue loss.

Thus, I find that Claimant's work had a direct link and was at least an aggravating factor in the stroke he suffered.

K Nature and Extent of Injury:

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either nature (permanent or temporary) or extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1929); St Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping. 22 BRBS 87, 91(1989); Care v. Washington Metro Are Transit Authority, 21 BRBS 248 (1988).

An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT) (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56(1985). A condition is permanent if Claimant is no longer

undergoing treatment with a view toward improving his condition Leech v. Service Engineering Co., 15 BRBS 18(1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446(1981). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that MMI has been reached. Dixon v. John J. McCullen & Assoc., 19 BRBS 243, 245(1986); Mills v. Marin Repair Serv., 21 BRBS 115, 117(1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially what the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202(1986); White v. Exxon Co., 9 BRBS 138. 142(1978), aff'd, mem., 617 F.2d 292(5th Cir. 1980).

Furthermore, the Act does not provide standards to distinguish between classifications and degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, Claimant must establish that he can no longer perform his former work due to his job related injury. Orleans (Gulfwide) Stevedores v. Turner, 661 F.24 1031, 1038, 14 BRBS 156 (5th Cir. 1981), rev 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 920 F.2d 424, 429-30(5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that be cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89(1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

In this case, I find that Claimant's condition never improved from the moment of his stroke in that he failed to regain consciousness. As such, I find that the stroke of July13, 1994 left him permanently and totally disabled.

F. Medical Expenses and Intervenor's Right of Reimbursement:

In general an employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. Colburn v. General Dynamics Corp., 21 BRBS 219, 22 (1988); Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984), Entitlement to medical services is never time-barred where a disability is related to a compensable injury. Addison v. Ryan-Walsh Stevedoring Company, 22 BRBS 32, 36(1989); Mayfield v. Atlantic & Gulf, Stevedores, 16 BRBS 228 (1984); Dean v. Marine Terminals Corp., 7 BRBS 234(1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. Tough v. General Dynamics Corporation, 22 BRBS 356 (1989); Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978).

In Shahady v. Atlas Title & Marble, 13 BRBS 1007 (1981), rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied. 459 U.S. 1146, 103 S. Ct. 786 (1983), the

Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician Under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. Banks v. Bath Iron Works Corp., Iron Works, Corp., 22 BEDS 301, 307, 308 (1989); Jackson v. Ingalls Shipbuilding Division, Inc., 15 BRBS 299 (1983); Beynum v. Washington Metropolitan Area Transit Auth9S 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. Atlantic & Gulf Stevedores, Inc., v. Neuman, 440 F.2d 908 (5th Cir. 1971); Matthews v. Jeffboat, Inc., 18 BRBS at 189 (1986). Under Section 7(d)(1), an injured employee cannot receive reimbursement for medical expenses which he provided payment unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency, refusal, or neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968(D.C. Cir. 1982) rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Bros., Inc., 16 BRBS 10 (1983). The burden of proof regarding compliance with this requirement is on the employee. Maryland Shipbuilding & Dry Dock Co., v. Jenkins, 594 F.2d 404, 407, 10 BRBS 1, 8, (4th Cir. 1979), rev'g 6 BRBS 550 (1977).

In this case there is no question that Employer was aware of Claimant's stroke and his emergency hospitalization from his initial admission to West Jefferson Hospital on July 13, 1994. Employer declined to cover the medical expenses, but rather, informed Claimant to seek coverage from Intervenor. Where Employer has ample notice of an injury it may not

invoke Section 907 of the Act to defeat coverage. Base Billeting Fund., supra, Nardella, supra, Employer should have investigated the issue of Claimant's medical care further. It cannot in good faith claim either claim a lack of notice or an inability to challenge the reasonableness of the charges or services provided, where as in the present case it did made no inquiry into the care provided Claimant In fact knowledge of Claimant's care is under such circumstances imputed to Employer. See Harris v. Sun Shipbuilding & Dry Dock Co., 6 BRBS 494 (1977); rev'd on other grounds sub nom. Aetna Life Inc., Co., v. Harris, 578 F.2d 52 (3rd Cit 1978).

Regarding Intervenor's right of reimbursement, there again is no question that Intervenor has a right of reimbursement for the medical care and expenses which it provided Claimant because of Employer/Carrier's Unlawful refusal to acknowledge and pay for such care. However, Intervenor does not have a first lien or right to reimbursement from the first monies Claimant may receive in this matter for an award of medical expenses is independent of awards under Sections 908 or 909 of the Act. See Union Stevedoring Corp., v. Norton, 98 F.2d 1012, 1016-1017 (3rd Cir. 1938). Moreover, none of the cases cited by Intervenor in support of first lien rights dealt with subrogation rights in the context of a longshore claim,

G. Death Benefits:

Initially it must be noted that Section 33 U.S.C. 908 disability benefits must be distinguished from Section 33 U.S.C. 909 death benefits as two separate causes of action, one for disability lying with the disabled employee, and one for death lying with the specified survivor of the decedent. Henry v. George Hymann Construction Co., 749 F.2d 65, 73 (D.C. Cir. 1984).

Section 9 of the Act provides in pertinent part:

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000,

(b) If there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average weekly wages of the deceased, during widowhood

(c) In computing death the average weekly wages of the deceased shaft not be less than the national average weekly wage as prescribed in section 6(b), but —
(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 6(b)(1); and
(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 10(i)) occurs at the employee has retired, the total weekly benefits shall not exceed one fifty -second part of the employee's average annual earnings daring the 52-week period proceeding retirement.

33 U.S.C. 909.

A claim for death benefits under the Act is a separate and distinct right from a claim for disability, and such a right does not arise until the death occurs, Puig v. Standard Dredging Corp., 599 F.2d 467, 469 (1st Cir. 1979). In such a claim, the time of injury cannot be prior to the employee's date of death. Lynch v. Washington

Metro Area Transit Auth., 22 BRBS 351, 354 (1989). Consequently, Claimant's widow is entitled to death benefits pursuant to Section 9 of the Act beginning October 2, 1997 and continuing.

H. Section 14(c) Penalty

Section 14 (e) provides:

(c) If any installment of compensation payable without an award is not paid within fourteen days after it become due, as provided in subdivision (b) of this section, there shall he added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owning to conditions aver which be bad no control such installment could not be paid within the period prescribed for the payment

In order to avoid this penalty, the Employer must either pay the correct compensation, controvert liability or show irreparable injury. Frisco v. Perini Corp., Marine Div., 14 BRBS 798, 800 (1981). Moreover, the assessment of this penalty is mandatory wt Section 14(e). An Employer's good faith is not relevant under Section 14 (e). Director, OWCP v. Cooper Assoc., Inc., 607 F. 2d 1385, 1389 (D.C. Cir. 1979). In addition, an employer may escape this penalty if it can show that either its failure to make timely payment or file a timely controversion were due to circumstances beyond its control. Gulley v. Ingalls Shipbuilding, 22 BRBS 262, 266 (1989), aff's in pert. part sub nom. Ingalls Shipbuilding v. Director. OWCP, 898 F.2d 1088 (5th Cir. 1990).

In this case Employer, did not controvert until December 13, 1994 which was clearly untimely and failed to provide any justification for such conduct. Claimant is thus entitled to an additional 10 percent compensation under Section 14(e) on all installment benefits not timely paid prior to the December 13, 1994 controversion.

1. Interest and Attorney Fees:

Claimant is entitled to an award of interest on all benefits outstanding. Strachan Shipping Co., v. Wedemeyer, 452 F.2d 1225 (5th Cir. 1971), cert. denied, 406 U.S. 958(1972); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), on recon., 17 SRBS 20(1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 28 of the Act and implementing Code off Federal Regulations Section 702.132 provide for approval of attorney's fees. Claimant's counsel is hereby allowed thirty (30) days from the date of service of this decision to supplement his present application and submit the application for attorney's fees, A service sheet showing that service has been made on all parties, including Employer, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following Order:

1. Employer/Carrier shall pay Claimant's widow compensation for Claimant's permanent total disability from July 13, 1994 to October 1, 1997 based on Claimant's average weekly wage of $653.85 in accordance with the provisions of Section 908(a) of the Act.

2. Employer/Carrier shall pay Claimant's widow the annual compensation benefit increase pursuant to Section 910(f) of the Act effective July 13, 1994, for the applicable period of permanent total disability.

3. Employer/Carrier is liable for a penalty assessment wider Section 9 14(e) of the Act on all installment benefits not timely paid prior to its December 13, 1994 controversion.

4. Employer/Carrier shall pay Claimant's widow funeral expenses and death benefits from the date of Claimant's death on October 2. 1994. to present and continuing pursuant to Section 909 of the Act.

5. Employer/Carrier shall reimburse Intervenor for all reasonable and necessary medical expenses it paid on behalf of Claimant as a result of his July 13, 1994 stroke in the amount of 606,306.64.

6. Employer/Carrier shall pay Claimant's widow interest on any accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior the date of judgment in accordance with 28 U.S.C. §1961.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on

Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

ORDERED this 4th day of May 2000, at Metairie, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge

Footnotes

fn1 References to the transcript and exhibits are as follows: trial transcript-Tr.; Claimant's exhibits- CX- p. ; Employer exhibits- EX: p. ; Intervenor exhibits-IX- p.

fn2 The facilities manager position was later changed to Facilities Director, a position currently held by Robert Allen Creighton. (CX-15, Tr. 109).

fn3 Witnesses provided several estimates of the distance between the tent and the waters edge ranging from 50 feet, (Tr. 64-66;CX-3), to 300-350 feet. (Tr. 134).

fn4 Claimant was terminated on August 13, 1994 because of his inability to return to work after 30 leave of absence. (CX-8)

fn5 Claimant's tax returns from 199O to 1994 show earnings between $31,844 (1994) and
$36,250 in 1991. (CX-1).

fn6 Employer objected to Ms. Bazor's testimony as hearsay. I permitted it as information relayed to her by her husband. Subsequent testimony from other witnesses with direct knowledge confirmed Ms. Bazor's testimony.

fn7 Ms. Bazor confirmed the fact that Claimant when initially hired spent 1 to 2 days a week with daughter Delaina. After July 4, 1994, Claimant never came home staying instead with Delaina and her family. (Tr. 99.100).

fn8 Banks placed the date of his hire in May 1994 when in fact it was June 1994. (CX-20, p.6). Banks was hired about June 16 or 2 days before Claimant hired Bob Creighton. (CX-20. p. 20; CX-15, p. 5).

fn9 CX-17 contains the deposition of security guard John Ronald Dicken, who reported Claimant's stroke and the tent area where Claimant was found unconscious.

fn10 As noted previously Claimant's maintenance duties were not limited to minor maintenance, but rather included all vessel maintenance with the exception of steering, navigation and power trains.

fn11 EX-4 contained detailed medical records for Claimant's treatment at West Jefferson Hospital immediately following his stroke.

(3)

Supreme Court, U.S.
FILED
JUN 10 2003
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No. 02-1637

In The
Supreme Court of the United States

JERRY KATE BAZOR, Widow of BEN BAZOR,

Petitioner,

v.

BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent, Louisiana Workers' Compensation Corporation, is not a publicly traded corporation. It is a mutual insurance company.

Respondent, Boomtown Belle Casino, is a limited partnership.

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COUNTER STATEMENT OF THE CASE

To clarify the Statement of the Case submitted by the petitioner, it must be specifically noted that Mr. Ben Bazor was hired by, and at all times pertinent, employed by the Boomtown Belle Casino. The construction of the Casino boat was contracted to and performed by Avondale Shipyards in Westwego, Louisiana and, the construction of the dock area, was performed by an outside contractor hired by Boomtown Belle Casino for that purpose. Likewise, the tent, which was to be used as a temporary shelter to house Casino patrons, once the Casino boat was in place, was likewise rented from and erected by an outside contractor.

The duties of Mr. Bazor, included preparing the vessel for gambling operations, but only insofar as that preparation concerned the installation of wiring for the slot machines, data processing equipment and security cameras, and a general clean-up of the boat to expedite its delivery. No one from the Boomtown Belle Casino, including Mr. Bazor, was involved in the actual construction of the boat.

The petitioner incorrectly states at page four of the Petition for Certiorari that Mr. Bazor "supervised the construction of the dock and vessel ramp". There is no evidence whatsoever that Mr. Bazor supervised any aspect of the construction of the vessel or that any work at all was performed on the vessel ramp. This attempted expansion of Mr. Bazor's work duties is incorrect and wholly unsubstantiated by the facts since the construction of the dock and adjoining buildings was still underway by an outside contractor.

Additionally, the record clearly shows that Mr. Bazor did not work "15 hour days". After the 4th of July holiday,

a mere nine days before the incident sued upon, the evidence shows that Mr. Bazor began working longer hours, approximately 10 to 12 hours per day.

REASONS FOR DENYING THE WRIT

Respondents, through undersigned counsel respectfully request that this Honorable Court deny the Writ of Certiorari. The United States Fifth Circuit Court of Appeals, in its Decision below, followed the express wording of 33 U.S.C. § 902(3)(B) which denies status under the Act to "individuals *employed* by a club, camp, recreational operation, restaurant, museum or retail outlet" (emphasis added). It is unquestioned that Mr. Bazor was employed by the recreational operation, namely, Boomtown Belle Casino. Hence, the inquiry must end at that point since Mr. Bazor is excluded under the express provisions of the Longshore and Harbor Workers' Compensation Act.

Even if status were found in this matter there is no basis for finding a determination of situs under 33 U.S.C. § 903(a) since the adjoining area where the incident occurred was not one "customarily used" for maritime activity.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE PETITIONER FAILED TO MEET THE STATUS REQUIREMENT FOR COVERAGE UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

The Longshore and Harbor Workers' Compensation Act at 33 U.S.C. § 902(3)(B) specifically excludes from

coverage "individuals employed by a club, camp, recreational operation, restaurant, museum or retail outlet". Since the plain wording of the statute excludes from coverage those individuals "employed by" recreational operations, the holding of the Fifth Circuit in this regard is correct.

A. Petitioner failed to timely raise the issue of coverage under a State Workers' Compensation Act; therefore, that argument is deemed to be waived.

The record of the trial in this matter, as well as the Briefs to the Benefits Review Board and the Briefs filed with the United States Fifth Circuit, Court of Appeals, are devoid of any reference by petitioners to any remedies under the State Workers' Compensation Act. Petitioner never prosecuted a claim under the Louisiana Workers Compensation Act (LA. REV. STAT. ANN. 23:1021 et seq.) hence the existence of any right or remedy under that statute has never been adjudicated. This argument was raised for the first time during oral arguments before the United States Fifth Circuit, Court of Appeals. In order for an issue to be considered on appeal that issue must first be raised below. *King v. Director, OWCP*, 904 F.2d 17 (9th Cir. 1990). Hence, any issue of coverage under the State Workers' Compensation Act was not properly before the United States Fifth Circuit, Court of Appeals and is not properly before this Court.

Additionally, the petitioner is incorrect in her assertion that if the decision of the Court of Appeals is upheld, claimant and those similarly situated would be left without a remedy. The law of Louisiana contemplates a tort remedy to claimants whose claims fall outside of any

compensation scheme, whether it is the Longshore and Harbor Workers' Compensation Act or the Louisiana Workers' Compensation Act. More specifically, in situations such as Mr. Bazor's, where he is not covered by the Longshore and Harbor Workers' Compensation Act, if a state workers' compensation claim were to be later denied (although no such claim has ever been made) on the basis that the injury is not covered by the Louisiana Workers' Compensation Act, then claimant herein would have a tort remedy available. *Hunt v. Womack*, 616 So.2d 759 (La. App. 1st Cir. 1993) writ den. 623 So.2d 1309 (La. 1993) and *Ellis v. Normal Life of Louisiana*, 93-1009 (La. App. 5th Cir. 5/31/94) (638 So.2d 422).

B. Congress intended that employees of recreational operations are to be excluded from coverage under the Longshore and Harbor Workers' Compensation Act.

Contrary to the assertion of petitioner herein, the fundamental basis for the holding of the United States Fifth Circuit, Court of Appeals in this matter was the plain wording of the statute. The *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998) case was cited by the Court as an example of the exclusion of coverage being granted to an employee of a corporation that was not a club, camp or recreational operation. In *Green,* the Vermilion Corporation had numerous interests, other than the operation of a hunting camp, but employed Mr. Green to work at its camp as a cook. Therefore, the Court of Appeals held that since Mr. Green worked at a club or camp he was excluded from coverage under the Longshore and Harbor Workers' Compensation Act.

A cursory review of the Opinion in this matter and the *Green* Opinion shows that the critical element of the identity of the employer is the marked difference between those two Decisions. In both cases the Court acknowledged that the nature of the employing entity, not the nature of the duty a given employee performs, is the initial inquiry. In the Decision below the Court noted that the legislative history of § 902(3)(B) also allows for the exclusion of employees from coverage under the Longshore and Harbor Workers Compensation Act, "because of the nature of the employing enterprise as opposed to the exclusions in paragraph 2(3)(A), which are based upon the nature of the work which the employee is performing") H.R. Rep. 98-570(I), 1984 U.S.C.C.A.N. at 2737.

Since *Green* can be distinguished from the case at bar, the *Green* Decision has no impact on coverage for an individual directly employed by the recreational operation nor upon any individual who may be engaged in the construction of a camp, club, restaurant or recreational operation, as Mr. Green was not engaged in such activities. Contrary to the innuendo of petitioner herein, the recreational operation was the employer of Mr. Bazor, namely, the Boomtown Belle Casino. Notwithstanding the identity of his employer, the Court of Appeals specifically found that all of Mr. Bazor's activities were in furtherance of the Casino operations. Namely, the maintaining of the Boomtown facility, wiring for slot machines, data processing and security systems on the Casino boat and cleaning the boat to expedite its delivery, all furthered the business interests of the Casino operation. Likewise, contrary to the assertion of petitioner herein, the exclusion under which coverage under the Longshore and Harbor Workers' Compensation Act was denied to petitioner herein extends

only to employees of the recreational operation. If Mr. Bazor had been employed by Avondale Shipyard or by the contractor who was constructing the Casino facility, the Courts may very well have determined that he was a covered employee depending on the nature of his employment duties. Thus, the Decision by the Fifth Circuit, Court of Appeals does nothing more than implement the express wording of the statute by removing from the coverage afforded under the Longshore and Harbor Workers' Compensation Act those individuals employed by a club, camp, restaurant, museum or recreational operation.

1. The Fifth Circuit's interpretation of § 902(3)(B) has no effect whatsoever on § 902(3)(F).

The provisions of 33 U.S.C. § 903(F) exclude from coverage under the Longshore and Harbor Workers' Compensation Act individuals employed to build, repair or dismantle any recreational vessel under 65 feet in length. As noted above, § 902(3)(B) turns on the nature of the employing entity and not the nature of the duties the employee performs. Section 902(3)(F) turns on the nature of the employee's duties and not the nature of the employing entity. These two exclusions are clearly targeted at two different types of employees. Additionally, the Casino vessel involved would in no way qualify under the provisions of § 902(3)(F). It must be again emphasized that Mr. Bazor did not participate in the construction of the vessel itself; rather his involvement was limited to only those aspects, which facilitated the Casino operations on the vessel. Hence, any comparison between the provisions of § 902(3)(F) and the facts of the instant case are irrelevant. Moreover, as with the argument concerning the potential

claim under the Louisiana Workers' Compensation Act, the argument which now, for the first time contests the status of the Boomtown Belle Casino as a "recreational operation", was never briefed or argued by the plaintiffs prior to the Petition for Certiorari. Hence, that argument should not be heard at this late date.

2. The decision of the Fifth Circuit Court of Appeals does not conflict with this Court's decision in *Caputo*.

As outlined previously, the statute in § 902(3)(B), carves out an exception of coverage based upon the nature of the employing entity. The provisions of § 902(3)(B) were added to the Act in the 1984 amendments to the Longshore and Harbor Workers Act, seven years after the decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). Moreover the *Caputo* case recognized that coverage under the act primarily focuses upon "maritime employment". The Longshore and Harbor Workers Compensation Act is not intended to cover anyone who "breathes salt air", rather, only those who are engaged in loading, unloading, repairing or building a vessel. See also *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S. Ct. 1421 (1985). This statutory exception to coverage for employees of recreational operations is wholly consistent with the intent of the Longshore and Harbor Workers' Compensation Act and with this Court's interpretation of that Act to provide coverage to those workers engaged in "maritime employment". 33 U.S.C. § 902(3). The claimant argues that the Decision of the Fifth Circuit is "contrary to the plain language of the LHWCA". Brief p. 14. In fact, the Decision of the Fifth Circuit, Court of Appeals is wholly consistent with the plain language of the LHWCA and carries forth the intent of the Act as expressly outlined in

that provision of the Act. When there is no dispute concerning the plain meaning of the statute, the statute should be implemented without regard to the legislative intent. In this case there was, and is no dispute regarding the plain meaning of § 902(3)(B) and, as such, the provisions of that statute should be carried forth by this Court upholding the Decision of the United States Fifth Circuit, Court of Appeals that the decedent, Mr. Ben Bazor, was not covered by the LHWCA at the time of his accident.

II. THE FIFTH CIRCUIT COURT OF APPEALS APPROPRIATELY APPLIED THE LAW OF "SITUS".

The jurisdictional element of situs is found in 33 U.S.C. § 903(a), which states:

> "Except as otherwise provided in this Section, compensation shall be payable under this Chapter in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

As with the statutory provisions on status, the clear wording of the statute requires that the area where the injury occurs be "used" by an employer in loading, unloading, repairing, dismantling, or building a vessel. A cursory review of the facts in this case shows that Mr. Bazor was not injured upon the navigable waters of the United States nor upon any pier, wharf, dry dock, terminal, building way or marine railway. Recall that Mr. Bazor's CVA occurred in

the temporary tent structure erected in the parking lot approximately one hundred feet from the Harvey Canal. Thus by definition, the facts show that Mr. Bazor's injury occurred in another "adjoining area". Whether an adjoining area is an appropriate situs for coverage under the Longshore and Harbor Workers' Compensation Act is determined by its use at the time of the injury. See *Nelson v. Guy F. Adkins Construction Co.*, 29 BRBS 39, 41 (1995). At the time of Mr. Bazor's injury the area in which he was situated was contemplated for future use for the dockside Casino but at no time was that contemplated area to be used for any of the enumerated purposes set forth in § 903(a). The clear wording of the statute requires that the adjoining area have an actual and current relationship to maritime activity. Since such is not the case the tent area cannot constitute an "adjoining area" as contemplated by § 903(a).

The *Hurston* and *Fleischmann* cases cited by petitioner to establish the alleged "conflict" between the Circuit Courts are inapposite since the structures where the claimant was injured in both cases was deemed to be a pier, not an adjoining area.

The interpretation by the United States Fifth Circuit, Court of Appeals correctly interprets the phrase "customarily used" and recognizes the temporal requirement of that phrase. For this reason alone the claimant has failed to establish an appropriate situs to confer jurisdiction under the Longshore and Harbor Workers' Compensation Act.

A. The Fifth Circuit's interpretation of the words "customarily used" is in accord with other circuit decisions, the reasoning of the United States Supreme Court and the legislative purpose underlying 33 U.S.C. § 903(a).

Contrary to claimant's assertion, the injury did not occur at a dock or a shipyard. The injury and resulting disability occurred at an area which was contemplated for future use of the recreational operation. As noted by the Court in *Sidwell v. Express Containers Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), "the key is the functional relationship of the employee's activity to maritime transportation". No serious claim can be made that the use of the Casino vessel has any "transportation function", the vessels are used simply because state law, at that time, required that the vessels move away from the dock while gambling is in process. The passengers embark and disembark from the vessel at the same location. Likewise, there is no transportation of cargo involved in any of these "voyages".

As the Court in *Sidwell* noted:

> "Thus an "other adjoining area" as to which coverage extends must be *like* a pier, wharf, dry dock, terminal, building way, or marine railway. Each of the enumerated "areas" is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shore side structure or facility. And the asserted "area" must be "customarily used by an employer in loading, unloading, preparing,

dismantling, or building a vessel" as the statute provides."

Contrary to claimant's assertion, the Fifth Circuit's interpretation of this statute is not in any fashion misguided or "narrow", it is simply the most logical interpretation of the plain language of the statute.

B. The focus of this litigation is the cardiovascular accident sustained by Mr. Bazor.

There is no question that that CVA occurred in the tent structure located in the parking lot at the Boomtown facility. Since there can be no claim under the Longshore and Harbor Workers Compensation Act until a disability occurs, that event formed the beginning of this claim. There is no competent medical evidence whatsoever of any type of "cumulative aspect of petitioner's injury". Claimant scrupulously avoided any medical testimony from Mr. Bazor's treating physicians. Hence, without any competent medical evidence before the Court to support the alleged "cumulative aspect" of this claim, this argument is absolutely without merit.

Claimant asserts that the Appellate Court has imposed a "temporal dimension" to the situs requirement. What the Court of Appeals has done is implement the clear wording of the statute, which through the use of the phrase "customarily used", must have a temporal element.

The "zone of special danger" is also a new theory, not presented to the Administrative Law Judge, the Benefits Review Board or the United States Court of Appeals for the Fifth Circuit. The "zone of special danger" theory is most often used in cases arising under the Defense Bases

Act or the Federal Employees Compensation Act. Even if that theory could be applied to the instant case, there is no evidence whatsoever that Mr. Bazor's workplace was uniquely dangerous. Interestingly, by the eleventh hour invocation of the "cumulative injury" claim and the "zone of special danger" doctrine, claimant seems to be tacitly admitting that the tent area, where Mr. Bazor suffered his CVA, was not an "adjoining area" as contemplated by § 903(a), hence that the injury did not occur on a covered situs.

Clearly, under any construction of the facts established in this matter, the injury did not occur on a covered situs. Therefore the Fifth Circuit's decision, finding that there was no maritime situs through the invocation of the plain language of § 903(a) should be affirmed in all respects.

CONCLUSION

THEREFORE, respondents Boomtown Belle Casino and Louisiana Workers Compensation Corporation requests this Honorable Court DENY the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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